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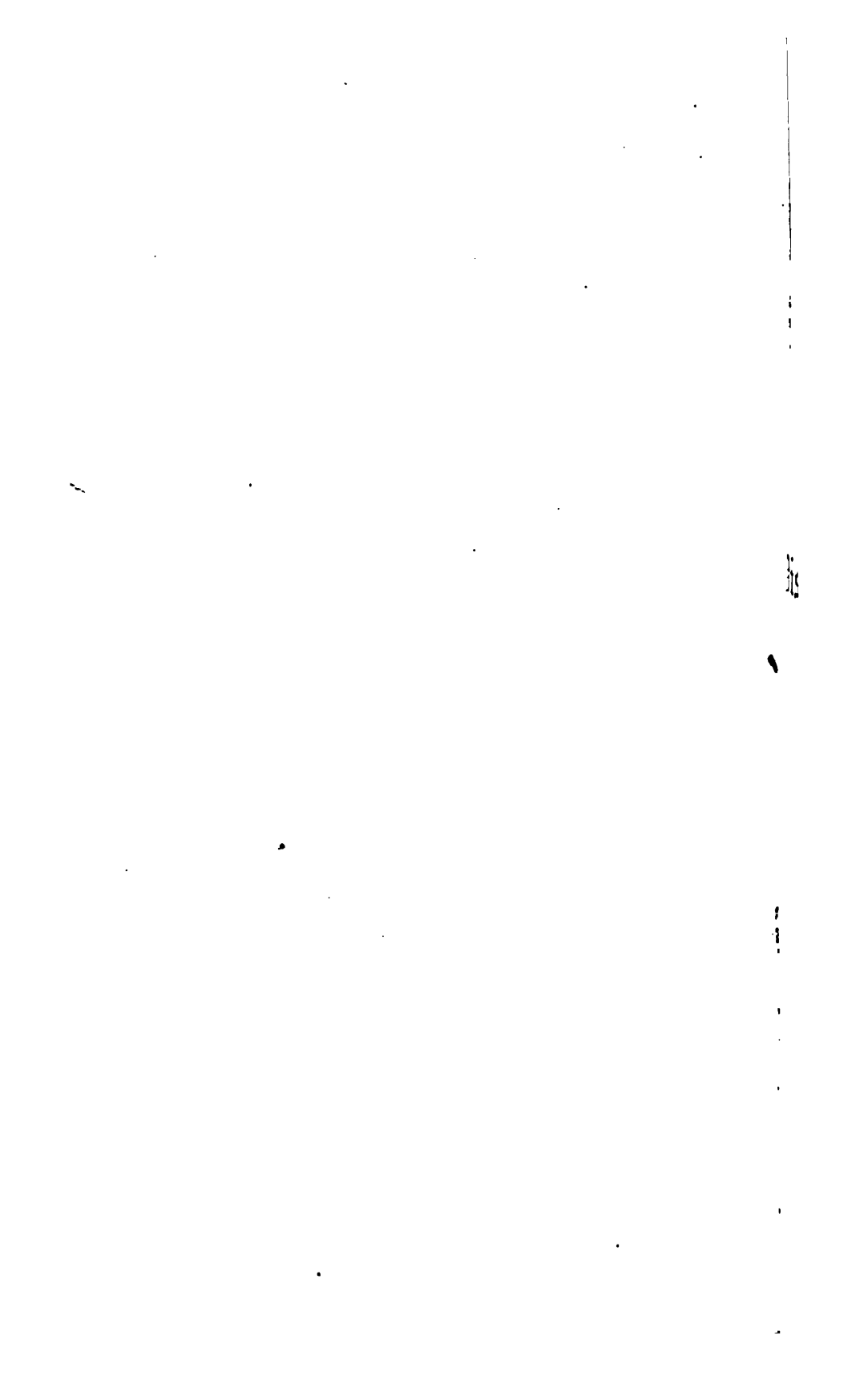












REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

District Courts of the United States

WITHIN THE SECOND CIRCUIT.

BY ROBERT D. BENEDICT.

VOLUME VI.

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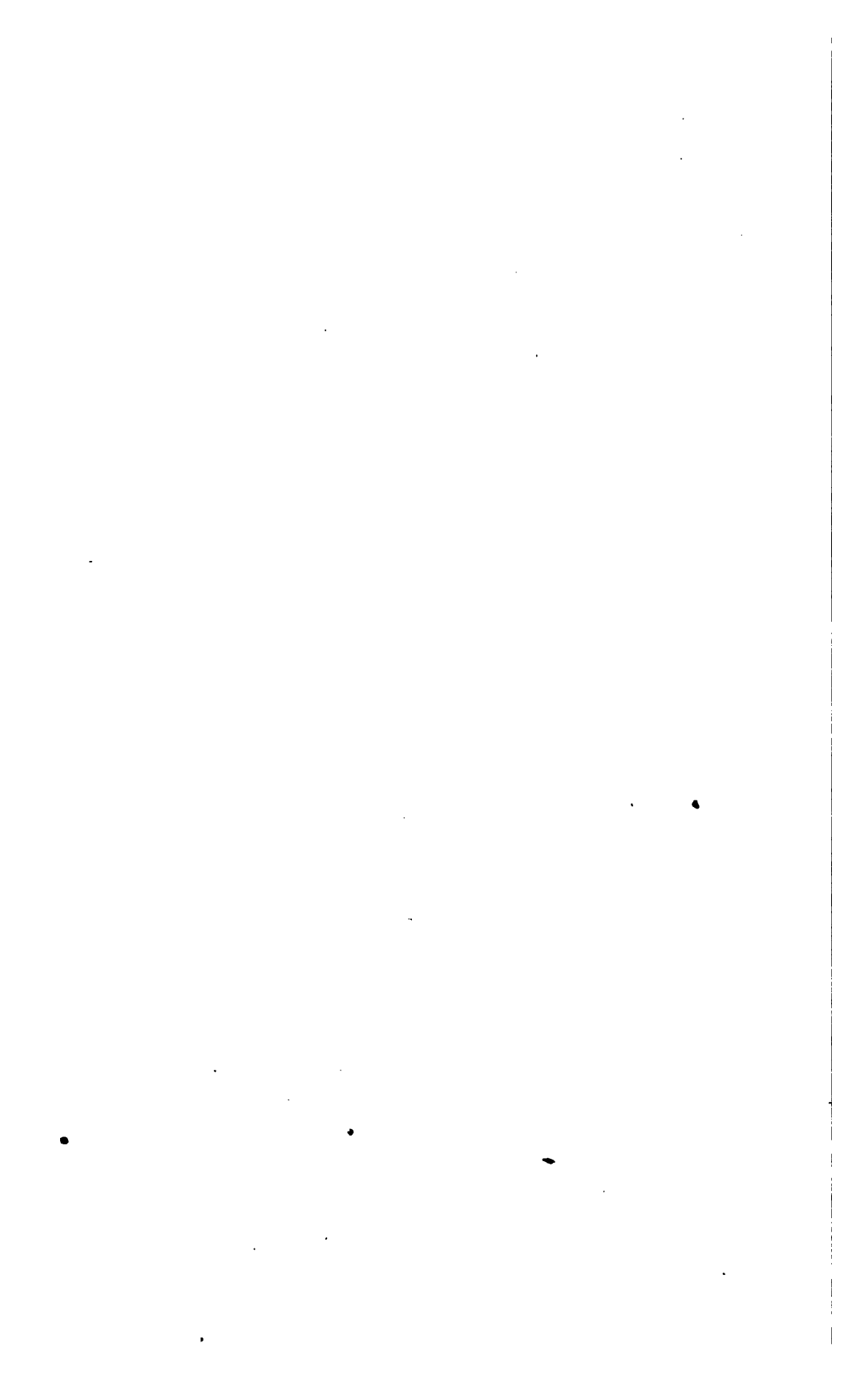
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W



**UNITED STATES
DISTRICT COURT REPORTS.**

UNITED STATES DISTRICT COURT REPORTS.

Eastern District of New York.

MARCH, 1872.

THE BARK IRMA.

PRIORITIES.—BOTTOMRY.—WAGES.—MASTER.

The master of a vessel had taken up money on bottomry. On the arrival of the vessel at her port of destination, a libel was filed against her by the holders of the bottomry bond. The master also filed a libel against her, to recover a balance due him for his own wages and for advances of wages made by him to the crew. The proceeds of the vessel not being sufficient to pay both claims, an application was made to the Court to settle their priority, the bottomry holders claiming that the master was liable to them for any deficiency on the bond, and that he could not, therefore, claim a priority over them. The bottomry bond did not contain any covenant on the part of the master, binding him personally for the debt.

Held, That, in the absence of such an express covenant, the master would not, by the maritime law, be liable for a deficiency on the bond;

That, in respect to the bottomry holders and the master, their claims, in respect to order of payment, must be subject to the general rule, by which wages are entitled to be paid in preference to bottomry claims.

The master of a ship is, in a certain sense, a public officer.

BENEDICT, J. The cases against this vessel have been brought before me, on an application for an order determining the priority of the respective demands in

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the distribution of the proceeds of the vessel, which are insufficient to pay all the claims against her. The only question which calls for any particular examination has arisen between the libellants, Timothy Darling & Co., whose libel is filed to recover the amount of a bottomry bond executed by Cummings, as master of the vessel, and Cummings himself, who has filed his libel to recover a balance due him for his own wages and for advance of wages made by him to the crew. If the demand of Cummings be paid out of the proceeds of the vessel, in preference to the bottomry bond, the remainder will be insufficient to pay the bottomry bond in full, and therefore the bottomry lenders contest the right of the master of the vessel to priority over the bottomry bond. The position taken is, that the master is personally liable to the bottomry lenders for the sum borrowed, and that, supposing that he has a lien for his demand, he cannot be paid in preference to the bottomry bond, when such payment will create a deficiency in the bond, which he is liable to make good.

The question raised is one which has seldom arisen, owing, doubtless, to the fact that in very many, if not in most, cases of bottomry, the master binds himself personally for the debt by means of a special covenant inserted in the bond, and is not therefore in a position to dispute his liability for any deficiency that may arise from the distribution of the proceeds of the ship. But in this instance the bottomry bond contains no such covenant, and the master denies any liability whatever to the bottomry lenders for any part of the bottomry loan. I am, therefore, called on to determine the question of law, whether, in the absence of any special agreement to that effect, the master of a ship incurs any personal liability to repay to the bottomry lender the amount borrowed on bottomry, when the bond becomes due by the safe arrival of the ship, and the proceeds of the ship and freight prove insufficient to discharge it in full.

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In considering this question, I am not required to speak of the liability of the ship master for neglect or malfeasance, nor of a case where the bottomry bond proves invalid, or where no risk has ever attached, or where the stipulated voyage is not performed, or where the ship and freight is not abandoned to the bondholder; nor yet of a case where the bond is executed by an owner of the ship. What I have occasion to say is, therefore, intended to refer to the case here presented, where it is sought to hold the master personally liable for the loan, where the bond is a valid bottomry bond, executed by the master as such, in a foreign port, for a voyage which has been duly performed, and where the ship and freight are applied, so far as they will go, to the payment of the bond, and where the master has made no special agreement to be responsible for the loan.

Upon this question, I remark, first, that the bottomry lender, in order to establish a personal liability on the part of the master, cannot resort to the general liability, which the master of a ship is presumed to incur for debts contracted and advances made in behalf of the ship. The implied contract of the master, arising, under the general rule of the maritime law, out of an advance of money for the ship, is extinguished when a lawful contract of bottomry is made, and the debt has been put at risk. All other obligations merge in the new contract, which places the lender in a new and different relation to the vessel, and it is to the rights and obligations arising out of the contract of bottomry alone that the lender must thereafter look.

The contract of bottomry, which is not only a contract of great sanctity, but also of great peculiarity, is not a mere agreement for security. "It is neither a sale, nor a partnership, nor a loan, properly speaking, nor insurance, nor a compound of different constructions—*undique collatis membris*—but it is a contract having a specific name (*un contrat nommé*), and a character pecul-

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iar to itself" (*Emerigon, Contrat a la Grosse*, ch. 1, § 2). When once the bottomry risk has attached, the creditor becomes a bottomry lender, and nothing else. "He who lends money on bottomry makes a contract which is to be followed out in all its remedies as such" (Curtis, J., 1 *Cur. C. C.* 351, *The Brig Ann C. Pratt*; *Brady v. Bates*, 9 *Met.* 250; *The Ann C. Pratt*, 18 *How.* 83). The holders of a bottomry bond are, therefore, not holders of a mortgage, and the rules applied in cases of mortgage have little or no application here.

But although the only contract, on which these bottomry lenders can rely, is the contract of bottomry, it does not follow that they have not, by that contract, the personal liability of the master, upon the safe arrival of the ship, notwithstanding the circumstance that the instrument given to bind the ship does not expressly provide for any personal liability of the master. A personal liability on the part of the master, in case of the safe arrival of the ship, may form part of a valid contract of bottomry, as has often been held where that liability had been stipulated for in the bottomry bond.

The question here is, whether such a liability does not, by implication of law, constitute an element in every such contract, as, for instance, it does in the contract with the seamen. These bondholders maintain that such personal liability is implied by the maritime law, and that it can be resorted to, at least to make good any deficiency, after exhausting their remedies against the vessel and freight.

In support of their position the words of Lord Tenterden are cited, where he says the remedy of the lender on bottomry is "against the master or the ship" (*Abbott on Shipping*, 5th ed. p. 156), and also the statement in *Kent's Commentaries* (3 *Kent*, p. 355), that "for the repayment of a sum borrowed on bottomry the person of the borrower is bound, as well as the property charged." These two citations from the high authorities named will

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be found, on examination, not to be to the same point. The borrower alluded to by Chancellor Kent is not the master, but the owner of the ship, as the context shows. On page 360 the master will be found spoken of as distinguished from the borrower. So understood, the citation has no direct bearing on the question under discussion. The remark of Lord Tenterden must be understood as referring to such a bond as he describes in a subsequent paragraph, and sets out at length in his appendix, which contains a special covenant on the part of the master (*Abbott on Shipping*, p. 160).

Reference is also made to the general principle of the maritime law, according to which the master of the ship is presumed to bind himself personally in every contract made on behalf of the ship, as showing the existence of such a liability in the contract of bottomry. But if such were the rule in all other cases, it would afford little reason for supposing the liability to exist in a contract of bottomry, for bottomry is a contract "resembling nothing and being consistent with nothing but itself" (Curtis, J., 1 *Cur. C. C. R.* p. 350); and I am of the opinion that the reasons, on which the general rule rests, will be found to be for the most part wanting in the case of bottomry. Take for instance the reasons which led to the personal liability of the master to the crew. The master is personally liable to the seamen, for sailors, because of well known traits, must have every security possible to prevent them from losing their wages and becoming objects of charity: They naturally look for their wages in the first instance to the master, who commands them during the voyage, who provides them their food, who cures them when sick, and punishes them when they disobey; and from long usage he thus becomes personally bound for their wages. Another instance is the personal liability of the master for the bills of material men, and for advances of money. Obligations of this class derive their distinctive char-

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acter from the fact that they are generally made in foreign ports, where they are to be discharged, and where the owners are not ; and it is therefore permitted to look to the master, who is present, leaving him to reimburse himself from the owners, when he returns home. Considerations of this character, coupled perhaps with the fact, that in the earlier history of navigation, as well as afterwards on the revival of commerce in the middle ages, the master almost invariably was an owner, unless he was a slave (*MacLachlan on Shipping*), led to the establishment of the presumption of personal liability on the part of the master in contracts made for the ship, as a "usage and custom of the seas." But it will be difficult to find in the maritime law any trace of such a presumption in cases of bottomry ; and the considerations which press in favor of it, on other occasions have in such contracts little force. The lender on bottomry is not ignorant and poor like the sailor. He becomes beneficially interested in the voyage. His loan is never to be repaid in the foreign port, where it is effected, but on the contrary is payable where the owners are supposed to be, or to have funds ; and the ship is specifically bound. No necessity therefore exists for the personal responsibility of the master. Furthermore, great injustice must follow, if such a personal responsibility, on the part of the master, be attached by the law to the contract of bottomry, because the master is without remedy over against the owners of the ship, for any sum thus extracted from him, notwithstanding the fact, that the owners receive the benefit of the loan. This results from the character of the transaction, and the nature of the liability on the part of the ship owner, which grows out of it. The owner of a ship is indeed said to be liable for a bottomry bond as well as the ship, if the ship arrives safe ; but this is not a liability arising from a contract of the owner, made by the hand of his agent, the master, with the bottomry lender. The

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master of a ship although an agent of the owner, is also in a certain sense a public officer. The master of a ship is "not an ordinary agent—but one of a special kind, *sui generis*" (Sir R. Phillimore, *The Thetis*, 22 *L. T. R.* 77). "He is a known and public officer" (*Sea Laws*, Art. 2, Of the masters of ships). "The rights and duties springing out of the position of ship master are of a public character" (*Bedarride, Com. de Code*, Liv. 2, Tome 2, Art. 359). "The master of a ship has a threefold responsibility : to the owners, to the freighters, and to society—the State" (*Boulay Paty*, Vol. 1, 383). "Though he (the master) receive a salary, yet he is a known and public officer" (*Molloy*, Book 2, Ch. II, §2). The contract of bottomry, when made by the master, is made by him, to a certain extent, in an official capacity. He does not, in a transaction of that character, act simply as agent of the owners, but as master of the ship. It is not within the scope of the ship master's authority, as the agent of the owners, to bind them personally as his principals, by a bottomry contract. The owners are liable when the vessel comes to them safe, but not because of the acts of their agent in borrowing money for them. Theirs is an original liability to the holder of the bottomry bond, arising out of their possession of the property bound for the loan, namely, the ship and freight. This peculiarity in the liability of the ship owner, growing out of bottomry, is pointed out by the Supreme Court of the United States, in the case of *The Virgin*, where the Court says : "In England and America, the established doctrine is that the owners are not personally bound, except to the extent of the fund pledged, which has come into their hands ; to this extent indeed they may correctly be said to be personally bound ; for they cannot substract the fund and refuse to apply it to discharge the debt. But in this case, the proceeding against them is rather in character of possessors of the thing pledged, than strictly as owners" (*The Virgin*, 8 *Pet.* 538—

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554). The later authorities in England and America are to the same effect (The Brig Ann C. Pratt, 1 *Curtis*, C. C. p. 350; *Stambach v. Farrin*, 6 *Eng. Law & Eq.* 421). Not only is such the law in England and America, but the same law exists upon the continent. By the German mercantile code, which in respect to such a subject may be presumed to state the rule of the maritime law as understood throughout a large part of Europe, it is declared (Art. 680, 7th Part), that the bottomry creditor can enforce his claims only to the extent of the bottomried objects, after the arrival of the vessel. The maritime law as administered in France appears to be the same.

If then the owners of a ship are not rendered directly liable by a contract of bottomry made by the master, they cannot be rendered indirectly liable, through a liability on their part to the master for any sum exacted of him by reason of the contract. And if the master be without remedy over against the owner of the ship, it is not to be supposed that he can be held personally liable, and thus compelled to bear, without recourse, the burden not only of a loan effected solely for the benefit of the ship owner, but also of the maritime interest; and that too when he is compelled by the responsibility of his office to effect the loan, whether willing or not to assume such a burden. The unjust effect of such a rule warrants the supposition, that it does not exist in the maritime law. Aside from its injustice, there is reason against it, founded in public policy; for to make the master by operation of law liable for the payment of the bottomry bond, or even for the deficiency after the ship and freight are exhausted, is to offer him an inducement to lose the ship, inasmuch as her safe arrival will cast upon him a responsibility which he escapes if she does not arrive. A rule which would in any case place the interest of the mariner in opposi-

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tion to the welfare of the ship, would be contrary to the whole spirit of the maritime law.

These considerations, which are of a nature entitling them to much weight in determining a question of maritime law, appear to me sufficient to warrant a rejection of the doctrine contended for by this bottomry lender, and I find no adjudged case which impels me to a different conclusion. No case has been cited by the advocates, where the doctrine in question has been sustained, and I find a decision to the contrary in the English Admiralty, where the same question arose in the same way, and where the determination was that the master of the ship had not ceded his prior right against the ship by taking up money on bottomry. Dr. Lushington says: "Here the master has not bound himself personally to pay the bond. His covenant in the bond is that he is master, and therefore he has authority to charge the bark, cargo, and freight, and that the bark, cargo, and freight, shall at all times after the voyage be liable to the payment of the money. He has not, therefore, incurred that personal liability which a master giving a bottomry bond generally incurs in express terms." (The *Salacia*, 1 *Lush.* 548.) Many remarks will be found scattered through the other cases in the English Admiralty which I have above cited, looking in the same direction. (See also *The Edward Oliver*, 2 *M. L. C.* p. 507; *The Jonathan Goodhue*, *Swaby*, 524.) It may, therefore, be said that the authorities in the English Admiralty are adverse to the position here taken by the bondholder. The continental writers are directly opposed to such a position. Thus Emerigon (*Traité de Contrats a la Grosse*, ch. 4, Art. 12, § 4) says: "If in the bottomry bond the master has bound himself and his goods (of which I have seen a thousand examples), he is held personally, in spite of the fact that he acted in the known capacity of agent, because he has rendered himself bound for the bond, and the lenders have trusted his credit. If, then, the vessel

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arrives safely, they may compel the master himself to pay the principal and the maritime interest which he has in his own name promised to pay. But if he has contracted only in the capacity of captain, the lenders, in case of the safe arrival of the ship, will be limited to an action *in rem* against the vessel and freight, without recourse to the owners, who abandon the property, or to the master, who, having contracted only in a qualified capacity, is not responsible for the unfortunate result of the voyage." Emerigon cites the Ordinance in his support. Later Continental authority is to the same effect. Bedarride declares that the master cannot be held personally liable for the payment of a bottomry bond which he has signed in his capacity as master for the necessities of the ship (*Com. de Code de Com.* Liv. 2, Tit. 9, § 931). And again (§ 935) he says: "On principle, therefore, the master, borrowing money on bottomry, contracts no personal obligation, neither on the part of the owner, nor with the lender; but with the exception that it is always lawful for the captain to bind himself directly and personally. The German mercantile code, already referred to, restricts the personal liability of the master on a bottomry contract to those cases where the master has arbitrarily changed the voyage, or arbitrarily deviated, or has improperly assumed new sea risks, and then gives him the opportunity to relieve himself by proving that the non-payment of the bond has not been caused through the change of voyage, or through the deviation, or through the new sea risk (art. 694, part 7). And the 18th Admiralty Rule of the Supreme Court of the United States clearly recognizes a similar rule of law. Indeed, the 18th Admiralty Rule goes far to compel the determination of this Court in this case adversely to the bottomry lenders upon the question under consideration, although their libel is not in conflict with the rule.

My conclusion, therefore, is, that in the present case no personal liability for any part of the loan has attached

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to the shipmaster, and the bottomry lender and the master must, therefore, in respect to order of payment upon this motion, be declared to be subject to the general rule by which wages are entitled to be paid in preference to a bottomry bond. But this is upon the assumption that the master has a lien upon the ship, as averred in his libel. The present being a motion founded upon the respective libels alone for the simple purpose of determining, at this period of the controversy, the question of priority, in order to save expense, the right to a lien is not put at issue. If it is intended to question that right, an issue must be framed by answer or exception, upon which a decree may be rendered.

Upon this motion the order will be that in the distribution of the proceeds in the registry, any decrees that may be entered upon the libels before me will be satisfied out of the proceeds in the following order: first, the wages decreed the mate; next, the pilotage decreed Eugene Gallagher; next, the sum decreed Cummings, the master; next, the sum decreed Timothy Darling upon the bottomry bond. The priority of the other demands among themselves need not be determined, as the demands above mentioned will absorb the whole fund.

For T. Darling & Co., *Martin & Smith.*

For Cummings, *Beebe, Donohue & Cooke.*

MARCH, 1872.

PARDON CONLEY v. THE FREIGHT OF THE
CANAL-BOAT G. C. BARRAS, AND FRANK
WILLIAMS, HER MASTER.

WAGES.—FREIGHT.—IRREGULAR PRACTICE.

A libel was filed against a cargo of coal on board of a canal-boat and against her master, to enforce a lien for seaman's wages, upon freight money alleged to be due from E. & M. on the cargo. The cargo was seized, and was claimed by the C. S. Company. But the only answer put in was one by E. & M. It appeared that E. & M. had chartered the boat of her master for a specified rate, and that, before the commencement of the action, and without notice of the libellant's demand, they had paid to the master all the money due from them under the charter. It also appeared that the cargo was shipped by the C. S. Co. under an agreement with E. & M. for freight payable to E. & M., which was due and unpaid at the filing of the libel.

Held, That the practice had been irregular, but the irregularity would not be noticed, as no objection had been taken to it;

That it was not necessary to determine whether the libellant could maintain an action to charge the charter money payable by E. & M. with a lien for wages, as such charter money had been paid over to the master without notice before the commencement of the suit;

That the freight money due from the C. S. Co. to E. & M. could not be held, because the libellant had not in his libel sought to charge it;

That the libellant was entitled to a decree against the master.

BENEDICT, J. This is an action by Pardon Conley to enforce a lien for wages upon certain freight money, alleged to be due for the transportation of a cargo of coal from Baltimore to New York in the canal-boat G. C. Barras, during which transportation the libellant was employed in navigating the boat. The master of the boat is likewise made a party defendant, and a decree *in personam* against him is also prayed for.

The cargo in question, which has been seized, is claimed by the Cunard Steamship Company. But the only answer interposed is that of the firm of Easton &

Conley v. The Freight of the Canal-Boat G. C. Barras.

McMahon, who, without objection, have interposed an answer, and have proved that they chartered the boat G. C. Barras to go where they might elect to send her, and carry such freight as they might desire to ship, for the compensation of five dollars per day, the master agreeing on his part "to keep at all times on said boat one able-bodied seaman besides the captain thereof;" and that before the commencement of this action, and without notice of the libellant's demand, they paid to the master all the charter money due from them under such charter. It also appears in evidence that the coal in question was shipped by the Cunard Steamship Company, to be transported under an agreement with Easton & McMahon for freight payable to Easton & McMahon, and that of such freight money, a greater sum than the amount claimed by the libellant was due at the time of filing the libel and the seizure of the cargo. Upon these facts the Court is asked to decree that the freight money due from the Cunard Steamship Company is charged with a lien to the extent of the libellant's demand.

It is unnecessary to notice here the irregularities of practice which this case discloses, as no objection has been taken to the mode of procedure. Nor is it necessary to determine whether under any circumstances the libellant could maintain an action to charge the charter money payable by Easton & McMahon, it appearing in evidence that all such money had been in good faith and without notice paid over to the master before the commencement of the suit. And in respect to the liability of the freight money, which, at the time of the seizure of the cargo, was due by the Cunard Steamship Company to Easton & McMahon, it is sufficient to say that the libel nowhere seeks to charge that fund. The cargo was indeed seized, but the action is against the money due by Easton & McMahon. No other freight is mentioned in the libel, and that is mentioned as the fund which the libellant seeks to charge

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with a lien. But, as before stated, the evidence shows that no part of that fund remained unpaid at the commencement of this action.

The libellant must therefore fail so far as his action relates to freight moneys. He is entitled to a decree against the master, by default, no appearance or defence having been interposed by him.

For libellant, *A. Nash.*

For claimants, *Goodrich & Wheeler.*

Southern District of New York.

APRIL, 1872.

THE SCHOONER BREEZE.

COLLISION IN EAST RIVER.—INSCRUTABLE FAULT.

Where two schooners came in collision in the East river in the daytime, and the Court, on considering the evidence, was unable to determine in what way the collision was caused;

Held, That the case was one of inscrutable fault, and that the libel must be dismissed.

The libellant in a collision case must establish fault on the part of the opposing vessel causing the collision, or he can recover nothing.

BLATCHFORD, J. This libel is filed by the owners of the schooner David Hazard to recover for the damages sustained by them in consequence of a collision which took place between that vessel and the schooner Breeze, in the East river, between New York and Brooklyn, shortly after noon, on the 28th of October, 1868, as the

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result of which the David Hazard was sunk, with her cargo. The David Hazard had come around the Battery, from the North river, and was bound to the Wallabout. The Breeze had come through Buttermilk channel between Governor's Island and Brooklyn.

The story of the libel is, that the David Hazard had turned the Battery into the East river; that the wind was blowing fresh from "the westerly," and about directly up the East river; that it was the first quarter of the flood tide; that the David Hazard had set, at the time, only a double-reefed mainsail and a jib, and her boom was off to port; that, after she had fairly reached the East river, the Breeze was seen astern, and on a course off the starboard side of the David Hazard, having a jib, foresail, mainsail and main gaff topsail set, and her booms off to starboard, sailing at a much greater rate of speed than the David Hazard, and bound the same way; that, when the David Hazard had reached a point off, or nearly off, pier 8, East river, and about one-fourth of the distance from the New York shore to the Brooklyn shore, and was keeping on her course, under a steady helm, she was overtaken by the Breeze, and was passed by her at the distance of about one-half of the length of the Breeze off; and that, when the Breeze had passed partly ahead of, and beyond the David Hazard, she suddenly changed her course to port, and across the bows of the David Hazard, and, in her course, struck the bowsprit of the David Hazard a violent blow, breaking off the bowsprit and splitting her open forward, so that she filled and sank. The libel avers, that the collision happened by the carelessness and want of skill of those navigating the Breeze, in, among other things, carrying too much canvas, and passing in such close proximity to the David Hazard, and then suddenly changing her course and attempting to cross the bows of the David Hazard; that the David Hazard kept steadily on her course; and that the change of the

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course of the Breeze was too sudden and too near for those on board of the David Hazard to avoid a collision.

From a perusal of the answer, it would hardly be supposed that it was attempting to describe the same collision that is referred to in the libel. It alleges, that, until the Breeze reached the East river, (she having come from Amboy, New Jersey), the wind had been about west by north; that, about that time, a slight squall came up from the west; that, as the Breeze entered the East river, on the Brooklyn side, a fleet of vessels was bound up the river, between the Breeze and the New York shore; that her master, in view of the squall, and of his having an errand in New York, concluded to anchor; that the Breeze kept on her course, to let such fleet get out of her way, they outsailing her; that, when the Breeze was about opposite the foot of Wall street, the way being clear, her master, in order to lower his sails in safety and come to anchor, put his helm down and brought the vessel around into the wind, and lowered all his sails except the foresail, and headed down the river and towards the New York shore, until some distance below Wall street, when he put his helm about amidships, and headed about on to the New Yprk docks, and prepared to anchor; that the Hazard was not in sight until some time after the Breeze had come around, and when the Breeze was preparing to anchor; that the Hazard was then to windward, near the Battery and heading about east, the course of the Breeze being, at that time, about northwest; that, if the Hazard had kept on her course, she would have cleared the Breeze and passed astern; that, instead of keeping to windward, she changed her course and headed on to the Breeze; that, when this was discovered, the helm of the Breeze had been placed amidships, and her foresail had been partially lowered preparatory to anchoring, and the Hazard was about a length off; that the master of the Breeze immediately put his helm up, but, before the ves-

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sel answered it, the bowsprit of the Hazard struck the side of the cabin of the Breeze about twelve feet forward of her stern, driving the cabin forward, breaking the rail, and otherwise seriously injuring the Breeze; that the force of the blow knocked the Breeze around, so that she payed off on the other stretch; and that the Hazard then slid off and went on up the river and sank.

The mass of contradictory and incomprehensible evidence in this case is such as to make it impossible to arrive at any entirely satisfactory conclusion as to the real facts. Some points, however, are well established. The marks of the collision left on the Breeze show certain things both affirmatively and negatively. There was a break on her port rail, about twelve feet forward of her stern. The space between her port rail and the port side of her house was about two feet. There was a dent in the port side of her house, made by the end of the bowsprit of the Hazard, at a point about three feet forward of the place where the port rail was broken. The blow angled forward in direction. The after part of the dent in the side of the house was deeper than its forward part. The house was shoved forward as well as to starboard. On these facts the claimants insist, and correctly, that, at the moment of the blow, there was an angle of 34 degrees between the forward directions of the two vessels.

The theory of the libel is, that the Breeze outsailed and overtook the Hazard, and passed her, being to the starboard, and then suddenly changed her course to port, across the bows of the Hazard, and, in so doing, struck the bowsprit of the Hazard. How this could have been, consistently with the condition of the marks left on the Breeze, and with the results of the blow upon her, it is impossible to imagine. For the collision to have occurred in the manner set forth in the libel, requires that the house on the Breeze should have been shoved astern instead of forward. I deem it impossible that the col-

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lision could have occurred by the passage of the Breeze across the bows of the Hazard, as claimed in the libel.

On the other hand, according to the answer, when the Breeze was heading northwest and the Hazard was heading east, so that, if the Hazard had struck the Breeze, in their then respective courses, the direction of the blow would have angled aft on the Breeze 45 degrees, the Hazard changed her course seven points, passing by the Breeze, and making a turn, so that she approached the Breeze from aft, and the direction of the blow angled forward on the Breeze 34 degrees. If, as the answer claims, the Breeze remained heading northwest, this would make the Hazard, at the time of the blow, head north by east. If the Breeze, heading northwest, was in the wind, then the Hazard, which, when heading east, was sailing with the wind four points abaft her beam, on her port side, and had, according to the evidence, her boom off to port, must have come around seven points towards the wind, and to within five points of the wind—an operation which would certainly have caused her boom to gybe over to starboard, which, on the proof, it never did. Moreover, the story of the answer makes the Hazard go through the most extraordinary manœuvre, of leaving her proper course, which was east, and turning seven points towards the wind and towards the Breeze, apparently for the sole purpose of hitting the Breeze. It is impossible to believe that the collision occurred in the manner stated in the answer.

Yet the collision did occur. It happened in broad daylight, when there was no reason why each vessel should not have seen the movements of the other, and when there were no circumstances to make the case one of inevitable accident, and when the collision must have been caused by fault on the part of both vessels or of one of them. I cannot determine, from the proofs, whether there was fault in both vessels or in only one of

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them, or what specific fault there was on the part of either. Certain it is, that the libellants have failed, by satisfactory evidence, to maintain the account of the occurrence given in the libel, and to show that the collision happened through any fault on the part of the Breeze.

I am free to say that the case is one, in my opinion, of inscrutable fault. In that view the point has not escaped attention, although not discussed by counsel, that the libellants may urge, on the strength of certain observations in text writers and in reported cases, that the damages sustained by the vessels ought to be equally divided between them. I have examined the authorities on the subject. The question is not settled for this Court, and I am free to adopt what I believe to be the proper rule, namely, that, where the libellant does not establish fault in the vessel sued, such vessel must be allowed to depart from Court without being mulcted in any amount, no matter whether the Court concludes that the collision was the result of inevitable accident, or of some fault that is inscrutable; and that it is only where the vessel sued is affirmatively and specifically held to be in fault, either solely or jointly with some other vessel, that she can be condemned in any damages. I cannot yield assent to the proposition, that a party can bring another into Court, and, without establishing against him the cause of action alleged, depart with a portion, at least, of the fruits of a successful litigation. I forbear to discuss this question at length, or to cite the authorities on the subject.

The libel must be dismissed, but, under the peculiar circumstances of the case, I shall impose no costs on the libellants.

Beebe, Donohue & Cooke, for the libellants.

C. H. Woodruff, for the claimants.

APRIL, 1872.

IN THE MATTER OF HENRY MARTIN, A
BANKRUPT.

ERRONEOUS ADJUDICATION OF BANKRUPTCY.—COPARTNERSHIP.

On the petition and schedules of one member of a copartnership, an adjudication of bankruptcy of the firm was made. It appeared that neither of the other members of the firm had consented to the adjudication of bankruptcy, and that they had no place of business within, and resided out of, the District where the petition was filed:

Held, That the adjudication as to the other members of the firm was erroneous, as the Court was without jurisdiction as against them, and that as to them such adjudication must be vacated, but should be allowed to stand as to the petitioning member.

ON the 16th of March, 1872, on the petition and schedules of Henry Martin, a member of the firm of Martin, Vaughan & Co., the adjudication of bankruptcy of said firm was signed by the register to whom the case was referred, under a misapprehension of the facts as to Vaughan and Montgomery, the other members of the firm. On a subsequent examination of the petition and schedules, it appeared that there was no evidence that either Vaughan or Montgomery had consented to the adjudication of bankruptcy of the firm; that they had no place of business in the District, and resided out of the District; and that the debts were all contracted prior to January 1st, 1869. The register thereupon, on the same day, of his own motion, made an order setting aside the said adjudication, without notice to the attorney for the petitioner, and, on March 18th, the following Monday, made an adjudication of bankruptcy of said Henry Martin individually.

The petitioner thereupon moved that the order set-

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ting aside the adjudication of March 16th, and the adjudication of March 18th, be vacated. The register certified the above facts to the Court, with his opinion that the adjudication of the firm of Martin, Vaughan & Co. was erroneous, and that Vaughan and Montgomery were entitled to be heard before being adjudged bankrupts.

BLATCHFORD, J. The adjudication of March 16th, 1872, as to Vaughan and Montgomery, was erroneous, as the Court was without jurisdiction as to them. I direct an order to be entered vacating such adjudication as to them, but allowing it to stand as to Martin alone. In order to prevent any possible embarrassment, the order had better provide that the register's order setting aside the adjudication of March 16th be vacated, and that the adjudication of March 18th be vacated.

APRIL, 1872.

JOHN SEDGWICK, ASSIGNEE, &C., v. THOMAS
T. SHEFFIELD.

PAYMENT OF DEBT BY INSOLVENT.—REASONABLE CAUSE TO BELIEVE
IN INSOLVENCY.

P. & Co., being insolvent and knowing their condition, within four months before the filing of a petition in bankruptcy against them, paid, through their recognized and authorized agent, to S., \$4,800, being a debt due to S., and payable on call. The assignee in bankruptcy of P. & Co. brought an action at law to recover back the money:

Held, That, this payment having been made in the ordinary course of business, under proper general authority, and not prevented or repudiated by P. & Co., they being in the habit of having these payments made through these agencies, to individuals occupying the position of S., the only question for the jury was, whether S., in receiving this payment, had reasonable cause to believe that P. & Co. were insolvent at the time, and had reasonable cause to believe that this

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payment to him was made with a view that he should have a preference in respect to this \$4,500 ;

That, the payment having been made in the establishment of P. & Co., out of the money of, and by the recognized agent of, P. & Co., they being insolvent and not stopping the making of the payment, and the payment having had the effect to produce a preference in favor of S., the jury were bound to conclude, under the law, that the payment was made by P. & Co. with a view to give a preference ;

That if S., at the time he received this payment, had reasonable cause to believe that the firm of P. & Co. was then in such a condition that it was about to stop payment of its debts, for want of money with which to pay them as they matured, in the ordinary course of business, then he had reasonable cause to believe that the firm was insolvent, in the sense of the bankruptcy Act, even though it had not actually stopped payment of its maturing obligations.

JUDGE BLATCHFORD'S CHARGE.—*Gentlemen of the Jury:* The general nature of this suit you have learned during its progress. It is true, as stated by the counsel in summing up this case to you, that this is the first case under the 35th section of the bankruptcy Act which has been brought in this Court before a jury. Large numbers of suits, brought to set aside preferences, have been prosecuted and adjudicated in this Court, sitting in equity, without a jury, where there was a prayer in the bill that the Court would decree that mortgages given by way of preference, assignments given by way of preference, judgments recovered and executions issued by way of preference, papers and documents conferring an apparent title on the person receiving the preference, be set aside and declared null and void—a species of relief which gives to the Court, sitting in equity, without a jury, jurisdiction. Some of these suits have been determined in favor of the party seeking to set aside the preference. Others have been determined in favor of the defendants. But, in this case, nothing took place which is sought to be impeached, but the naked payment of money. No documents or papers, to be set aside or declared null and void, passed between the parties—no mortgage, deed, conveyance, execution, judgment, or other instrument. Therefore, this suit has been brought

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as a suit at law, which, under the Constitution of the United States, requires a trial by jury ; and it is for you, gentlemen, on the facts in this case, as you shall understand those facts from the evidence, under the law and the interpretation of the statute as it shall be given to you by the Court, to give your verdict in this case either for the plaintiff or the defendant.

This bankruptcy Act, which, from the length of time it has remained upon the statute-book, now some five years, must be assumed to have met the general approbation of the community, it having stood longer than any other bankruptcy Act, of which this is the third, that we have had in the history of our Government—this bankruptcy Act has, for its main object, to distribute the property of the persons specified in it as liable to its provisions, equally among all their creditors, without preference to any of them ; and the system laid down in this Act, and applied in its administration by the Courts administering it, is in marked contrast to what was the privilege of debtors and the rights of creditors, at least in the State of New York, prior to the passage of this Act. The principle of the Act proceeds upon a high policy, considered to be a benefit to the commercial and trading community. Before the passage of this Act, any individual finding himself about to suspend payment, or to fail (as the ordinary expression is), or to be in a condition in which he was unable to pay all his creditors in full, dollar for dollar, could, subject to certain immaterial restrictions, exercise a choice and preference among his creditors, could devote his entire assets to pay in full such *bona fide* creditors as he chose to select, to the entire exclusion of others. That privilege is cut up by the roots by this bankruptcy Act, and it is the intention of the Act to produce that change, while, at the same time, it does not at all interfere with the ordinary pursuits of business. It is designed to protect creditors. It does not at all deal with that class of the

community who transact their commercial business for cash, who, when they sell and deliver their goods, receive the money for them, or who, when they purchase their goods, pay the money for them; but it deals with those commercial transactions, and with those individuals engaged in commercial transactions, where there is a passage of property from one to another, without, at the same time, an extinguishment and liquidation, entire and final, of the consideration for that property, where the business is done on credit. The principle upon which it proceeds is, that while it does not interfere with the ordinary operations of business, while an individual can, if he will contract a debt, and not deal upon cash principles, protect himself by asking and demanding security at the time, and while the Act protects all such transactions made in good faith, and for a present consideration, it says to creditors: "If you deal upon credit solely, without security, you shall all stand upon an equal footing, and it shall not be within the power of your debtor, when he is insolvent, to make a preference among you. You are free entirely, as creditors, not to give credit without getting security at the time. That privilege is open to you. Exercise it fully for a present consideration; or, if you have allowed a debt to become due to you, or to become contracted to you, obtain your security at a time when there is no possible chance of there being a violation of the bankruptcy law. But, if you will enter the domain of a simple creditor, the law sets before you, in plain language, that you are not thereafter, under certain specified circumstances, to obtain a preference, having waived your privilege, when you contracted your debt, of then and there obtaining the security which you might have obtained, but which you voluntarily relinquished, contracting your debt as a general creditor." The principle upon which the statute rests is manifest. It is, that any one of you, seeing a person apparently in prosperous circumstances, and

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trusting him upon what you see ostensibly to be his condition and his property, shall not some day suddenly find that you have been relying on a broken reed, that he has suspended payment and failed, and that you are to receive nothing, but that everything is given to certain preferred and favored creditors. The object underlying this legislation in the bankruptcy Act is, that men shall not be exposed to the temptation of trading when they have no business to trade, when they are really insolvent, by borrowing money from individuals whom they can confidentially protect and prefer, and going into the market with such money, and using it to obtain credit for large purchases in dealing with their ordinary creditors in the business of trade, and, in the end, committing what amounts to a fraud under the circumstances of the case. This policy, introduced into the bankruptcy law, is founded upon the principles I have mentioned, and is regarded as wise and beneficial, compared with the former system.

It is not every transaction by a person insolvent, or in contemplation of insolvency, that is condemned by the bankruptcy Act. It is limited in its scope; and it has been interpreted, in all the particulars in which it comes under consideration in this case, by decisions which I shall cite to you. The provision of the law (§ 35), under which this case arises, is a very plain one: "If any person being insolvent, or in contemplation of insolvency, within four months * before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his

* By the amendment to the bankruptcy Act, passed June 22d, 1874, this time is changed to two months, in cases of involuntary bankruptcy.

property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." There are certain facts in this case which are not contested, and which are to be taken as true. One is, that this transaction between the house of James K. Place & Co. and Thomas T. Sheffield did take place on the 19th of November, 1867, and that that was within four months prior to the filing of the petition in bankruptcy in this case. It is also conceded, in this case, that James K. Place & Co. were, at that date, the 19th of November, 1867, insolvent, in the sense of this law. Further, it is not in dispute that Mr. Sheffield was a creditor, and, as appears from the evidence, a *bona fide* creditor, of the house of James K. Place & Co. Whether he was a creditor to this amount of \$4,500 because of money which he had loaned to them, or deposited with them, or whether he was a creditor because of salary earned and not paid to him, makes no difference. The debt is of the same character, under the law, in either case. Except as against the bankruptcy law, it is not disputed that the payment of this \$4,500 to the defendant was a legitimate payment, a payment such as one man in law and in morals would be obliged to make to another. Nor is it claimed that the payment was one which, but for the bankruptcy law, was not a proper payment to be made at the time it was made, with reference to the maturity of the debt. In other words, it was not a payment in anticipation, which Mr. Sheffield had no right at the time to call upon James K. Place & Co. to make, because it was, as appears from

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the evidence, a debt payable whenever Mr. Sheffield should call for it. These are matters which are not contested. This case, then, so far as respects points litigated in it, comes down simply to this, which is the only question, under the law, which you have to consider—whether Mr. Sheffield, receiving this \$4,500, had reasonable cause to believe that James K. Place & Co. were insolvent on the 19th of November, 1867, and reasonable cause to believe that this payment to him was made with a view that he should have a preference in respect to this \$4,500, and obtain this \$4,500, dollar for dollar, in full, as against other creditors of the firm of James K. Place & Co., who should receive less than dollar for dollar. I say that that is the only question for your consideration, for the reason that, under the law, as interpreted by the decisions which I have mentioned, if, in this case, this \$4,500 was paid to Mr. Sheffield, and received by him from the recognized, proper, official, and authoritative representative of James K. Place & Co., it is of no consequence whether James K. Place or James D. Sparkman knew that this money had been loaned to the firm by Mr. Sheffield (if that was the nature of the debt), and it is of no consequence whether James K. Place or James D. Sparkman, individually, knew that Mr. Morgan, or any one else, having authority to make payments generally for the firm, had paid this particular \$4,500 to Mr. Sheffield, and it is of no consequence whether or not James K. Place or James D. Sparkman had any idea, or motive, or notion, or individual purpose, in respect to this payment. If the payment was made in the ordinary course of business, under proper, general, authority, and was not repudiated by James K. Place & Co., and if James K. Place & Co. were, at the time, insolvent, they being held by the law to know their own condition, unless there is some evidence to show that they did not know it, and had good reason for not

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knowing it, and if they, being in the habit of having these payments made through these agencies, to individuals occupying the position of Mr. Sheffield, did not act in such manner as to stop and prevent the payment, the payment was, under the law, made with the intent, on the part of James K. Place & Co., to produce all the consequences which the payment, under the circumstances, would naturally and properly produce. And if, under the circumstances, not being prevented by James K. Place & Co., who had the power to prevent it, and who, knowing their condition, were bound to interpose to prevent it, that payment, in their then condition, had the effect to produce the preference, then, in judgment of law, the inevitable conclusion is, that James K. Place & Co. made the payment with a view to give a preference, and on that branch of the case there is no question of fact for the consideration of the jury. Because, if, as is undisputed in this case, the payment was made in the establishment of James K. Place & Co., out of the money of James K. Place & Co., by the recognized agents of James K. Place & Co., at a time when James K. Place & Co. were insolvent, and if James K. Place & Co. did not stop the making of the payment, and if the payment has had the effect to produce a preference in favor of Mr. Sheffield, then the jury are bound to conclude, under the law, that the payment was made by James K. Place & Co. with a view to give a preference. Such is the law, as settled by the highest tribunal in this land, and by all the authorities that have interpreted this statute. Therefore it is, that I say that the only question of fact for your consideration is, whether Mr. Sheffield had reasonable cause to believe,* at the time he received this \$4,500, that James K. Place & Co. were insolvent, and that this payment was made

* By the amendment to the bankruptcy Act, passed June 22d, 1874, there must be *knowledge* that the payment, &c., is made in fraud of the Act, and reasonable cause to believe that the party is insolvent.

in fraud of the Act—in other words, that this payment would give him the preference, provided you find that it has given him the preference.

In order that there may be no mistake in regard to this matter, I shall say what I have to say on the subject in the very language of the Supreme Court of the United States, on such points as are involved in the question which is the only question for your consideration. In *Toof v. Martin* (13 *Wallace*, 46), the Supreme Court interprets the first clause of the 35th section in this way: "That clause was intended to defeat preferences to a creditor made by a debtor when insolvent or in contemplation of insolvency. It declares that any payment or transfer of his property, made by him whilst in that condition, within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void, if the creditor has, at the time, reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt Act; and it authorizes, in such cases, the assignee to recover the property or its value from the party who receives it. * * * The counsel for the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, *in money*, does not constitute insolvency, within the provisions of the bankrupt Act. The argument is especially addressed to language used by the District Judge, * * * to the effect, that, at the time the transfers were made," the transferees "did not believe the bankrupts were able to pay their debts, in money, but were able to do so on a fair market valuation of their property and assets. The District Judge held that this was a direct confession of a fact which in law constitutes insolvency," that is, an inability to pay debts, as they mature, in money, although, on a fair market valuation of their property and assets on one side, and their debts on the other, they were able to pay, "and observed,

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that, if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent." The term insolvent, when applied to traders and merchants, in the bankruptcy Act, is used to express inability to pay debts as they become due in the ordinary course of business. In such sense the term is used when merchants and traders are said to be insolvent, and that is the sense intended by the bankruptcy Act. In the present case it is not disputed that James K. Place & Co. were merchants and traders, within the sense of this rule.

Upon the subject in respect to which I have already made some observations to you, the Supreme Court, in the same case, says: "It is a general principle, that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him, in such case, and not upon the assignee or contestant in bankruptcy." That was a case where a suit was brought by the assignee in bankruptcy against the party who had received a preference, and it is in respect to a suit of that kind that this language is used.

The observations I have cited apply to that part of the case which concerns the insolvent condition of James K. Place & Co., and the view with which this payment, if it operated as a preference, on the evidence, was made by them—a branch of the case in which the Court instructs you there is no question of fact for you to pass upon.

We now come to the part of the case upon which a question of fact arises for your consideration—whether Mr. Sheffield, at the time he received this \$4,500, had reasonable cause to believe that the bankrupts were insolvent, and that a fraud on the Act was intended. On that subject, the Supreme Court, in the same case, uses this language: “The statute, to defeat the conveyance, does not require that the creditors should have had absolute knowledge on the point” of insolvency of their debtors, “nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact.” The minds of individuals are differently constituted. Some persons arrive at their belief on very slight grounds; others hesitate and doubt on every subject. The belief of individuals, under the weakness of human nature, is very apt to be influenced by their desires. The bankruptcy Act takes the question entirely out of any such domain. It does not say that the creditor must have believed that the debtor was insolvent. It says, “having reasonable cause to believe.” It is for twelve independent jurymen to say, it is for an independent Court, in a suit in equity, to say, not whether the creditor believed, in point of fact, but whether he had reasonable cause to believe. Did he shut his eyes? Did he shut his ears? Did he persistently and wilfully refuse to believe, when he had reasonable cause to believe? Were there such things before him that an indifferent person, judging of the matter, would say: “You had reasonable cause to believe this thing; you ought to have believed it; you shut your eyes to it; you shut your ears to it.” The matter is not referred to the actual belief of the creditor, depending upon his strength or weakness of mind, upon his actual capacity for judging, in view of his interest; but the test is, reasonable cause to believe, judged of by the ordinary operations of the human mind, as a jury or a Court shall, in view of the transac-

tion, determine whether the man had or had not reasonable cause to believe. On that subject the Supreme Court says, in the same case: "Reasonable cause they must be considered to have had, when such a state of facts was brought to their notice, in respect to the affairs and pecuniary condition of the bankrupts, as would have led prudent business men to the conclusion, that they could not meet their obligations, as they matured, in the ordinary course of business." The Supreme Court cites, with approbation, on this subject, the case of *Scammon v. Cole* (5 *Nat. Bank. Reg.* 257,) an equity suit, which came before one of the judges of the Supreme Court of the United States, Mr. Justice Clifford, in the Circuit Court in Maine, where he makes some very clear observations on this subject. The Supreme Court goes on to say, that the Act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors; and that any transfer by an insolvent debtor, made with a view to secure his property, or any part of it, to one creditor, and thus prevent an equal distribution thereof among all his creditors, is a transfer in fraud of the bankruptcy Act.

It is for you to say, upon the principles stated to you, whether Mr. Sheffield, at the time he received this \$4,500, on the 19th of November, 1867, in view of what, according to the evidence in this case (because you are to be confined to that strictly), had been communicated to him in reference to the condition of the firm of James K. Place & Co., had reasonable cause to believe that it was then insolvent, that it was in such a condition that it was about to stop payment of its debts for want of money with which to pay them as they matured in the ordinary course of business. If he had reasonable cause to believe that, then he had reasonable cause to believe that it was insolvent in the sense of the bankruptcy Act. Even though it had not actually stopped the payment of its maturing obligations, he had reasonable cause to be-

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lieve that it was insolvent if he had reasonable cause to believe that it was in such a condition that the gate must be shut down for want of means to pay, as they matured, its accruing obligations that were coming due. It is necessary, however, that he should not only have had reasonable cause to believe that the firm was insolvent, but that he should have had reasonable cause to believe that this payment to him of the \$4,500 was going to operate, in respect to the \$4,500, to give to him that \$4,500, dollar for dollar, as a preference, while other creditors would not get dollar for dollar for their debts. That is the question of fact, on which you are to pass. If you shall believe that the plaintiff, upon whom is the burden of proof in this case, has made out this reasonable cause to believe on the part of the defendant, the plaintiff is entitled to recover the sum of \$4,500, with interest from the commencement of the suit, which is agreed to be the sum of \$5,369 75. If the plaintiff has made that out, by a fair preponderance of evidence, he is entitled to your verdict. If he has not made it out, by a fair preponderance of evidence, to your satisfaction, the defendant is entitled to your verdict.

The jury failed to agree on a verdict.

 APRIL, 1872.

IN THE MATTER OF THE STUYVESANT BANK, A BANKRUPT.

EVIDENCE.—EXAMINING WITNESS AS TO ESTATE OF BANKRUPT.—
RIGHT OF WITNESS TO HAVE COUNSEL.

In an examination of a witness respecting the estate of a bankrupt, on the application of a creditor, other creditors have not the right to intervene and to interpose objections to questions put.

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In such an examination a witness is not entitled to counsel, even though his examination may establish a liability on his part to the bankrupt's estate, and must be compelled to answer questions respecting his transactions with the bankrupt.

IN this case, a witness, who had been president and afterwards receiver of the bank, was under examination, at the instance of John Mack, a creditor. Questions were put to the witness touching advances made to the bank by him during his presidency thereof. In the course of this examination, the witness was asked to state specifically when and in what way a loan of \$50,000 to the bank, to which he had testified, had been paid by him, or if he had any book or memoranda by which he could determine. Counsel appearing on behalf of W. R. Barr, another creditor, objected to the question. The register disallowed the objection, and the witness declined, by advice of counsel, to answer. The same counsel, appearing also as counsel for the witness, claimed to be recognized as such, and insisted that, inasmuch as the whole line of the examination pointed towards an assumed liability of the witness himself to the bankrupt, and his answers might tend to establish that liability, the witness was entitled to counsel. The register having decided that, under the ruling of the Court in *Fredenburg's Case* (2 *Benedict*, 133), the witness was not entitled to counsel, certified the above questions to the Court, with his opinion, that, in an examination of a witness respecting the estate of a bankrupt, on the application of a creditor, other creditors have not the right to intervene and to interpose objections to questions put; that the claim of counsel to appear for the witness was untenable, and could not be considered stronger because his examination might establish a liability on his part to the bankrupt's estate; and that the question put to the witness, being in the regular line of investigation concerning an important and large transaction with the bankrupt, was one which the creditor was

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entitled to have answered, and the witness should be compelled to answer it.

BLATCHFORD, J. I concur in the views of the register.

APRIL, 1872.

IN THE MATTER OF THE HERCULES MUTUAL
LIFE ASSURANCE SOCIETY, ALLEGED TO
BE A BANKRUPT.

BUSINESS CORPORATION.—NON-PAYMENT OF COMMERCIAL PAPER.—
BONA FIDE DEFENCE.

A life insurance company is a business corporation, within the purview of section 37 of the bankruptcy Act.

Under the amendment to the 39th section of the bankruptcy Act, passed July 14th, 1870 (16 *U. S. Stat. at Large*, 276), even if the suspension of payment of commercial paper has continued for fourteen days, yet a *bona fide* denial of liability on the paper in respect to which the suspension occurs, is such an adequate legal excuse, that the party ought not to be adjudged a bankrupt solely for suspending for fourteen days on the paper, even though, on investigation, the bankruptcy Court may be of opinion that, in fact, the debtor was liable on the paper.

A corporation has power to make commercial notes, without express authority.

BLATCHFORD, J. This is a petition by Rosalie Libline, for an adjudication of bankruptcy against the Hercules Mutual Life Assurance Society of the United States, a corporation organized under the laws of the State of New York providing for the incorporation of associations for transacting the business of life insurance. It is undoubtedly a business corporation, within the purview of section 37 of the bankruptcy Act

The indebtedness alleged by the petitioner, is a

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promissory note made by the corporation, in its corporate name, and signed by its president, and by its assistant secretary, dated May 16th, 1871, for the sum of \$1,000, payable six months after date, to the order of the petitioner. The act of bankruptcy alleged in the petition is, that the corporation "has stopped and suspended, and not resumed, payment of its commercial paper within a period of fourteen days, to wit, from the 19th day of November," 1871, "to the present time" (January 6th, 1872); "that a large amount of its commercial paper has been issued, while the said corporation was insolvent, which said commercial paper is past due and remains unpaid, and which the said corporation could not be able to pay in the ordinary course of its business, being insolvent at the time of making the same; that the corporation has property which it has fraudulently refused and neglected to appropriate towards the payment of its indebtedness."

[Inasmuch as the 39th section of the Act, as amended by the Act of July 14th, 1870, has been repealed by the Act of June 22d, 1874, the discussion which here followed, of the construction of that Act of 1870, is omitted.]

So much of the petition as alleges that the corporation has property which it has fraudulently refused and neglected to appropriate towards the payment of its indebtedness, must be regarded as an allegation of a fraudulent stoppage of payment. This is no allegation of any act of bankruptcy in respect to this corporation, for the reason that it is not a banker, broker, merchant, trader, manufacturer or miner.

The remaining allegations are, that the corporation, while insolvent, issued a large amount of its commercial paper, which paper is past due and unpaid, and which it could not be able to pay in the ordinary course of its business, and that it has stopped and suspended, and not resumed, payment of its commercial paper from the 19th

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of November, 1871, being more than a period of fourteen days.

The commercial paper shown to have been issued by the corporation consists of negotiable promissory notes, in the usual form of such notes, payable to order, at specified times after date, and running in the name of the corporation, and signed by its proper officers. The only consideration shown for such notes was loans of money to the corporation. On this it is insisted that the notes are not commercial paper of the corporation, within the Act. One point taken is, that the corporation has no express power to make notes. But it is not shown that it is inhibited from borrowing money for the legitimate purposes of its business, and from giving notes as evidence of such indebtedness. In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, or to become a party to negotiable paper (*Angell & Ames on Corporations*, § 257). A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends ; and this includes the power to borrow money for use in its legitimate business, and the power to give a time engagement to pay the debt, in any form not prohibited by statute (*Curtis v. Leavitt*, 15 *New York*, 9, 62 ; *Smith v. Law*, 21 *Id.* 296, 298, 299). In the present case the evidence shows that the notes spoken of in the petition as commercial paper were given, either originally or by renewal, for loans of money made to the corporation for use, and used by it, for the legitimate purposes of its business.

In the view I take of the clause in question, the decisions before the Act of 1870 in regard to the meaning of the term "commercial paper," in the clause as it then read, to the effect that it must be commercial paper given by a banker, merchant, or trader, in the course of, or in connection with, his business as such, and not merely commercial paper in form given for loans of

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money, have no application to the term as found in the clause as amended by the Act of 1870. There can be no doubt that, where the Act declares that any person who gives his commercial paper, and then stops or suspends payment of it, and does not resume payment of it for fourteen days, may be adjudged a bankrupt, it means, by "commercial paper," bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money, which, by their form, and on their face, purport to be such instruments as are, by the law merchant, recognized as falling under the designation of "commercial paper." Under this definition the notes in this case were commercial paper, within the Act.

The allegation that the corporation issued this paper while insolvent has no relevancy in this case, except as bearing on the allegation that it has stopped and suspended, and not resumed, payment of such paper, for fourteen days; and the same remark is true of the allegation that the corporation could not be able to pay such paper in the ordinary course of its business, the paper being overdue. The question then comes to this sole point—whether the corporation has stopped or suspended and not resumed payment of such paper within a period of fourteen days, within the true intent and meaning of the Act.

One of the points most seriously contested, in this case, in the evidence, and on the hearing, was, whether the corporation was really liable to the petitioning creditor on the note set forth in the petition. I think its liability on that note is established by the evidence. The \$1,000 which she loaned on the note of Mr. Homberg, for \$1,000, indorsed by Mr. Reymert, of the 16th of December, 1870, was really loaned to the corporation, through Mr. Reymert, its president, and was used for the business of the corporation, the note being a note made to raise money for the corporation, and being one of three notes made by Homberg for that purpose, and loaned to

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the corporation in exchange for its note of the same date for \$3,500, the aggregate amount of such three notes. This note for \$3,500 was afterwards returned to the corporation, and the three notes of Homberg were extinguished, the note in the petition being given to the petitioner in exchange for the \$1,000 note of Homberg on which she loaned the \$1,000. In so giving its note to the petitioner, the corporation did what, in justice, it was bound to do, as respected both the petitioner and Homberg and Reymert, to give to the petitioner its liability for the \$1,000; and, if she chose to take that and give up any liability of Homberg and Reymert, it was at her option to do so. She did so, and the corporation gave her the evidence of what was, in fact, a debt of its own to her.

This note set forth in the petition was not paid at its maturity, November 19th, 1871, and it had not been paid when the petition was filed, January 6th, 1872. Several other notes of the corporation were due when the petition was filed. But, in regard to all of them, as well as to the note held by the petitioner, I do not think the evidence makes out a case of the stoppage or suspension and non-resumption of payment of the notes, within the sense of the Act.

When a person fails generally to meet his commercial paper according to the usual course of business, and suffers not some, but all of it, as it matures, to go to protest, and so comes to a general suspension, because unable to proceed further with his business, he is undoubtedly within the clause, the suspension continuing for fourteen days. But, on the other hand, the clause ought not to be used to enable a creditor to collect an ordinary debt on commercial paper, where the circumstances show that, although the paper is not paid, though due, there has been no stoppage or suspension of payment of the commercial paper of the debtor, within the meaning of the clause. In such case the ordinary remedy furnished

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through a suit to collect the note, is all that the creditor is entitled to (*In re Compton*, 2 *Bank. Reg.* 182). It is not a stoppage or suspension within the clause, when a sufficient excuse is shown why the paper was not paid; and, even though the suspension may have continued for fourteen days, yet a *bona fide* denial of liability on the paper in respect to which the suspension occurs, is such an adequate legal excuse, that a person ought not to be adjudged a bankrupt solely for suspending for fourteen days on the paper, even though, on investigation, the bankruptcy Court may be of opinion that, in fact, the debtor was liable on the paper (See *Davis v. Armstrong*, 3 *Bank. Reg.* 6; *In re Thompson*, *Id.* 45; *In re Hollis*, *Id.* 82.) The true view on this subject, is, in my judgment, that laid down in *McLean v. Brown* (4 *Bank. Reg.* 188), by Judge Treat—that the suspension referred to in the Act is a general suspension of commercial paper, not the refusal to pay paper in respect to which liability is denied; that the bankruptcy Court will not sit to try the validity of the reasons alleged for the non-payment of the paper in respect to which the liability is denied; that it is not a Court for the mere collection of debts; that each case must be considered by itself in connection with the circumstances surrounding it; but that, when a party fails to pay his paper for want of means, and continues unable to pay it, he has suspended, within the meaning of the Act. It by no means follows, that a debtor may not, under certain circumstances, be considered as having really suspended payment generally of his commercial paper, although but a single piece of paper is shown to have lain over unpaid for fourteen days. On the other hand, the Court must guard against being imposed upon by a denial of liability which is altogether sham, and not made in good faith. The denial of liability may, however, be founded on reasons which are not valid, and which would fail as a defence in a direct action on the paper, and yet the denial may be made in

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good faith, in such wise that the non-payment cannot be regarded as a stoppage or suspension, within the Act.

In the present case, it is not shown that the corporation failed for want of means to pay the note held by the petitioner and the other paper referred to, nor is it shown that it was insolvent when the petition was filed. It is not alleged to have preferred any creditor, when insolvent, nor is it alleged to have committed any other act of bankruptcy than the suspension of payment for fourteen days of its commercial paper. Although subject to the supervision of the authorities of the State created for the purpose of investigating the affairs of insurance corporations and winding them up when insolvent, no proceedings had been taken against it as an insolvent institution, by the State authorities. Within a week prior to the maturity of the note held by the petitioner, the former president of the corporation resigned and a new president took his place. The affairs of the corporation seem to have been in much confusion, and its books were not kept in such form as to afford the information which they ought to have afforded in regard to its business. Its accounts had not been kept separate from the accounts of its former president, and, without imputing any misfeasance or malfeasance to any person, it is not too much to say, that the information, and want of information, on the part of the new president, in regard to all the commercial paper referred to, and its consideration, and his views and those of his associates, honestly entertained, as the proof shows, in regard to the liability of the corporation to pay the same, were such that the failure to pay it, and the continuance of such failure down to the time of the filing of the petition, cannot be regarded as a stoppage or suspension and non-resumption of its payment, within the Act.

The petition is dismissed, with costs.

J. D. Reymert, for the petitioner.

A. R. Dyett, for the debtors.

APRIL, 1872.

THE STEAM PROPELLER THOMAS SWAN.

STEAMBOAT ACT.—INTER-STATE COMMERCE.—PENALTY.—SECURITY
OF PASSENGERS.

A steamboat, engaged in carrying freight between New Jersey and New London, Connecticut, while at New London, received on board a number of persons and carried them to Mystic Island in the State of Connecticut, for the purpose of a prize fight, and then carried them to Noank, in Connecticut. She was not provided with life preservers, &c., as was required by the 5th section of the Act of August 30th, 1852 (10 *U. S. Stat. at Large*, 61), nor had her boiler been inspected, as required by the 9th section of that Act. A libel was filed against her, to recover a penalty of \$500 therefor :

Held, That the power of Congress to regulate commerce among the several States extends to the waters traversed by the steamboat, but that it is requisite that the vessel which is to be subject to such regulations as those alleged to have been violated, should be engaged in inter-state or foreign commerce ;

That this steamboat was not shown to have been so engaged, within the principles laid down in the case of *The Daniel Ball* (10 *Wall*. 557).

BLATCHFORD, J. This suit is brought by the United States against the steam propeller Thomas Swan, to recover the sum of \$500, as a penalty. The libel of information alleges, that, on the 2d of March, 1870, the Thomas Swan, being a vessel propelled in whole or in part by steam, was navigated, with passengers on board, at and from the port of New London, in the State of Connecticut, without complying with the terms of the Act of August 30th, 1852 (10 *U. S. Stat. at Large*, 61), in this, that she was then and there navigated, with passengers on board, not being provided with life preservers, and floats, and fire buckets, and axes, as required by the 5th section of said Act, and also in this, that she was then and there navigated with passengers on board, without having been inspected, as required by the first subdivision of the 9th section of said Act, contrary to the

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first section of said Act ; and that thereby the said vessel became subject to a penalty of five hundred dollars, and to be seized and proceeded against summarily, by way of libel, therefor, in this Court. The libel prays for a decree for the said penalty against the vessel, and for her condemnation and sale to satisfy the amount of the penalty.

The answer excepts to the libel, and alleges the following grounds of exception : (1.) The libel does not show a cause of action against the vessel ; (2.) It is not set forth in the libel, that the alleged carrying of passengers was any except between ports in the same State and in the internal commerce thereof ; (3.) The libel does not set forth any cause of action, or carrying of passengers, on waters, or in a business, over which the United States had or has jurisdiction. As matter of fact, the answer avers, that, on the day stated in the libel, the vessel was, against the will of her master and owner, taken possession of by a mob, and used by such mob to carry them from New London, in the State of Connecticut, to Mystic Island, in the same State ; that such transportation was against the wish and desire of the master, owner and authorized agent of the vessel, and against their rights ; and that, for such acts of violence, neither the vessel nor her owner, who is the claimant, is responsible. The answer also states, as a ground of exception to the libel, that the libel does not allege that any suit or prosecution has ever been commenced or attempted, or any penalties found, against any person or persons who committed any of the acts alleged in the libel, and that, therefore, no lien exists against the vessel.

The libel alleges a seizure of the vessel, before suit brought, on waters navigable from the sea by vessels of ten or more tons burden, and within this District.

The 5th section of the Act of August 30th, 1852, provides, that "every such vessel, carrying passengers,"

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that is, as defined in the 1st and 3d sections of the Act, every "vessel propelled in whole or in part by steam," and carrying passengers, shall be provided with a certain number of life preservers or floats, and fire buckets and axes, as specified in the 5th section. The 1st subdivision of the 9th section of the same Act provides for the inspection once in every year, at least, by certain inspectors, of every steamer employed in the carriage of passengers. The 1st section of the same Act provides, that if any vessel propelled in whole or in part by steam, shall be navigated, with passengers on board, without complying with the terms of that Act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the Act of July 7th, 1838 (5 *U. S. Stat. at Large*, 304). The penalties contained in that section are the forfeiture and payment to the United States of the sum of five hundred dollars, for which sum the vessel "shall be liable, and may be seized and proceeded against summarily, by way of libel, in any District Court of the United States having jurisdiction of the offence."

The answer raises the question whether Congress has any power, by legislation, to regulate the carrying of passengers by a vessel under such circumstances as existed in this case. The Thomas Swan was employed, at the time in question, in the regular business of carrying coal, from Hoboken in New Jersey, to New London and Norwich in Connecticut, and in taking back to Hoboken such cargo as she could procure. She had no accommodations for passengers, no cabin for them, and was not in the business of carrying them. She had been to Norwich and discharged there some iron which she had taken from Hoboken. From Norwich she went to New London, and there discharged all the rest of her cargo, being coal. Her boiler was injured on her trip from Norwich to New London, and it was repaired while she lay at New London. On the occasion in question

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she carried a large number of persons from New London, to an island called Mystic Island, below the mouth of the harbor of New London, and near the Connecticut shore, on which island such persons landed, the vessel remaining at a wharf at the island. The persons so carried were some of them actors in, and others of them spectators at, a pugilistic combat which took place on the island. Afterwards such persons reembarked on the vessel, and were taken by her to and landed at a place called Noank, on the main land of Connecticut. From there the vessel proceeded, without any passengers, to the city of New York, touching on the way at a wharf in the harbor of New London. The trip with the persons referred to, other than the proper crew of the vessel, was wholly within waters in the State of Connecticut.

The power invoked, under which it is claimed that the legislation of Congress can be held to apply to this vessel, while engaged in the transaction in question, is that conferred on Congress by the eighth section of the first article of the Constitution, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." There is no doubt, since the decision in the case of *Gibbons v. Ogden* (9 *Wheaton*, 1), that the power to regulate commerce among the several States, comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States, which are accessible from a State other than that in which they lie; and that such power, so far as locality is concerned, extends to the waters traversed by the *Thomas Swan* while carrying the persons referred to, on the occasion in question. (*Gilman v. Philadelphia*, 3 *Wallace*, 713, 724; *The Daniel Ball*, 10 *Wallace*, 557, 564). But, while the conferring of that power authorizes all appropriate legislation to insure the convenient and safe navigation of all the navigable waters of the United States, including the subjection of vessels to inspection and license, in order to secure their proper

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construction and equipment, yet the legislation is only authorized when it protects or advances inter-state or foreign commerce; and this requires, at least in respect to regulations like those alleged to have been violated in this case, that the vessel, to be subject to such legislation, shall be engaged in inter-state or foreign commerce. (*The Daniel Ball*, *supra*; *The Bright Star*, 1 *Woolworth's C. C. R.* 266.)

Was the *Thomas Swan* engaged in inter-state or foreign commerce, in respect to the carrying of passengers, on the occasion referred to? In the case of *The Daniel Ball* (*supra*), a penalty was sought to be recovered against the vessel by the United States, because she had not been either licensed or inspected, as provided by the said Acts of 1838 and 1852. It was set up, as a defence, that the vessel was engaged solely in domestic trade and commerce within the State of Michigan, and was not engaged in trade or commerce between two or more States, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed. The license was required for a vessel transporting merchandise or passengers; the inspection, for a vessel carrying passengers. The *Daniel Ball* was employed in transporting merchandise and passengers on a route wholly in the State of Michigan. Some of the goods she carried were shipped on her for places in other States than Michigan, and some came from other States, and were destined for places within the State of Michigan. She was a common carrier on the route on which she ran, although she did not run in connection with or in continuation of any lines of transportation beyond her route. The Supreme Court held, that, so far as the vessel was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan, and destined to places within that State, she was engaged in commerce between the States, and was subject to the

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legislation of Congress. The ground of the decision was, that the vessel was employed as an instrument of commerce between the States—commerce between the States, in any commodity, commencing whenever such commodity has begun to move, as an article of trade, from one State to another—and that the fact that several different and independent agencies were employed in transporting the commodity, some acting entirely in one State, and some acting in two or more States, did not affect the character of the transaction, but each agency was subject to the regulation of Congress to the extent in which it acted in such transportation.

I do not think the *Thomas Swan* is, on the evidence, brought within these principles. It is not shown that she transported any passenger whose destination was, in any proper sense, from any place without the State of Connecticut to Mystic Island, or from Mystic Island to any place without the State of Connecticut. She was not, in any proper sense, an instrument in carrying passengers from without the State of Connecticut to Mystic Island, or from Mystic Island to any place without the State of Connecticut. Nor is there any evidence that any passenger she carried was transported, in any proper sense, by her agency, from without the State of Connecticut to Mystic Island, or from Mystic Island to any place without the State of Connecticut. No circumstance like the buying of a ticket for transportation, though by different agencies, from any place without the State of Connecticut to Mystic Island, or from Mystic Island to any place without the State of Connecticut, on the part of any passenger carried by the *Thomas Swan* is shown. Nor is it shown that any person she took to Mystic Island had any destination to Mystic Island at any time while such person was outside of the limits of Connecticut. The only tickets shown to have been sold connected with any transportation to Mystic Island, were tickets sold at New London, which entitled the buyers

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to transportation to Mystic Island and back to a point in Connecticut. The fact that the persons who returned from Mystic Island to the main land in the vessel, intended to go to places outside of Connecticut, cannot affect the question.

The libel must be dismissed.

Thomas Simons (*Assistant District Attorney*), for the United States.

Beebe, Donohue & Cooke, for the claimant.

APRIL, 1872.

THE SCHOONER DUTCHESS.

COLLISION.—VESSEL AT ANCHOR.—PLEADING.—INEVITABLE ACCIDENT.

A sloop at anchor was sunk in the night, and a libel was filed against a schooner to recover the damages, alleging that the schooner negligently ran into her and sank her, in consequence of the schooner's being insecurely anchored. The answer of the schooner denied any collision, and alleged that the schooner was properly anchored, and dragged her anchors through the resistless force of the elements alone, and alleged that, if any injury was done to the sloop by the schooner, it was the result of inevitable accident:

Held, That, on the evidence, it was proved that there was a collision between the two vessels sufficient to account for the sinking of the sloop;

That therefore, on the pleadings, the burden of proof was on the schooner to show that that collision was caused by inevitable accident, and that she had failed to establish it.

BLATCHFORD, J. The sloop *Exertion*, owned by the libellant, while at anchor on the night of November 22d, 1870, off the foot of Hammond street, New York, laden with a cargo of brick, was sunk. The libel alleges that the sloop, while so lying at anchor, was run into and

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against by the schooner Dutchess, in consequence of the Dutchess' being insecurely and improperly anchored, and no proper attention being paid to her, and seeks to recover the damages resulting from such collision, on the ground that it caused injuries to the sloop, by reason of which she sank.

The answer denies that the Dutchess was improperly or insecurely anchored and that no proper attention was paid to her. It alleges, that the sloop sank through injuries occasioned by the negligence of her own crew, and not from any collision between her and the schooner; that the schooner was properly and securely anchored and manned, and managed with due care and proper skill; that she dragged her anchors through the resistless force of the elements, without any fault on the part of those on board of her; that human skill and precaution could not have prevented her drifting; and that any injury that was done to the sloop by the schooner, if any was done, which is denied, was the result of inevitable accident only.

I deem it satisfactorily established by the proofs, that the schooner, while she was dragging her anchors, came into collision with the sloop, and inflicted the injury in consequence of which the sloop sank. The answer does not set up that the sloop was anchored in an improper place, or in proximity to the Dutchess too close for safety, nor is either of such facts established by the evidence. Nor does the answer set up that any negligence on the part of the sloop caused the collision, if there was one. It merely sets up that there was no collision, but that the sloop sank from some injuries attributable to the negligence of her crew, and caused otherwise than by a collision between her and the schooner, and that, if there was a collision, it was the result of inevitable accident. The manner of the collision, and the character of the wound, as described by the witnesses from the sloop, and as established by the

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evidence, were such as to furnish adequate cause for the sinking of the sloop; and the evidence for the defence gives no reasonable explanation of how the sloop could have sunk or did sink from any other cause than a collision between her and the schooner. There having been, then, a collision sufficient to cause the damage done, the only defence set up is inevitable accident. The sloop being at anchor, and being run into by the moving schooner, the burden of proof is on the schooner to establish this defence of inevitable accident. The sloop anchored in the day time, her position was visible and known to those on the schooner, and they gave her no warning, that they deemed her to be anchored too near to them. The collision was caused by the dragging of the anchors of the schooner, and it is for her to make it clear that such dragging could not have been prevented by proper care and vigilance. She has failed to show that she maintained a proper watch on deck, that she discovered her dragging as soon as it commenced, and applied proper remedies as soon as possible, and that her dragging was not the fault either of the condition of her jib, or of the arrangement of her anchors and chains, or of the management of the vessel after the dragging was discovered. The allegation in the answer, that the sloop sank through injuries occasioned by the negligence of her own crew, even if it could be considered as an allegation of negligence contributing to a collision, is too vague and general to be a triable allegation. But the proof shows no negligence on the part of the sloop.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages.

Beebe, Donohue & Cooke, for the libellant.

C. P. Hoffman, for the claimant.

The Steamship Helvetia.

APRIL, 1872.

THE STEAMSHIP HELVETIA.

PENALTY.—GOODS NOT ON MANIFEST.

A steamship arrived in the port of New York from England. Certain articles subject to duty were found on board of her after her arrival, concealed in the purser's room and in the ship's storeroom, which had been brought in her from England, and which were not entered on the ship's manifest. The master of the vessel testified that he made up the manifest; that he had no knowledge or information, at any time, that the goods were in the vessel; and that he took all precautions in his power to prevent smuggling. A libel was filed against the ship and the master to recover the value of the goods, but the suit was discontinued against the master:

Held, That, under the 28d and 24th sections of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 644), and the 8th section of the Act of July 18th, 1866 (14 *Id.* 180), the vessel had incurred a penalty to the amount of the value of the goods, which could be enforced against the vessel, even though it had not been enforced against the master; and that the facts stated by the master did not bring the case within the proviso in the 24th section of the Act of 1799.

BLATCHFORD, J. The libel, in this case, is brought by the United States, and alleges that the steamship Helvetia, within this District, and on waters navigable from the sea by vessels of ten or more tons burden, was seized by the collector of the port of New York, for breach of the revenue laws of the United States, and that this suit is brought against the said vessel and against Archibald Thomson, her master, in a cause of forfeiture, on the ground that, on the fifteenth of November, 1869, at the port of New York, certain goods, wares and merchandise, which are enumerated, of the value of \$654 92, were imported and brought into the United States in said vessel, of which said Thomson was master, from a foreign port or place, and were not included in the manifest on board, as required by the 23d

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section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 644), contrary to the 24th section of said Act, whereby said master forfeited and became liable to pay to the United States the said sum of \$654 92, as the value of said goods; and that, by reason thereof, and by force of the 8th section of the Act of July 18th, 1866 (14 *U. S. Stat. at Large*, 180), said vessel became holden for the payment of said penalty against said master, and became liable to be seized and proceeded against summarily, by libel, to recover the same, in this Court. The libel prays for a decree for said forfeiture against Thomson and against the vessel, for said sum of \$654 92, as a lien thereon, and that the vessel be condemned for the same and sold to satisfy said lien.

The answer of the claimants of the vessel denies all the statements of the libel, and alleges that the master was not guilty of any fraud or negligence, or other act or omission for which he was liable to the penalty sued for. It also excepts to the libel on the grounds (1), that the libel does not set up or show a cause of action against the steamer; (2) that it does not set up or show a cause of action cognizable in this Court; (3) that it does not set up or show that the master or the owners of the vessel, or either of them, has or have been convicted or held liable for any penalty, or that they have evaded service of process, or cannot be served therewith. It also denies the jurisdiction of this Court to enforce the penalty in admiralty.

The suit has been discontinued as respects the master.

As testimony in the case, there is a written admission that one Chalker "will prove that he was an officer of the United States, that, from information which he received, he searched the steamship *Helvetia* on the 15th of November, 1869, and found concealed on board of said vessel, in the purser's room, and in the ship's store-room, in barrels which he was told contained provisions,

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and which appeared to contain them, and in other places, hidden away and concealed, the articles specified in the list annexed, which are subject to duty under the laws of the United States; that said articles had been brought from England in said steamer by the purser of said steamer, into the United States, concealed as stated; and that neither of the articles in the list was or were entered on the manifest of the vessel, and that the articles in the annexed list are of the value of \$654 92, in this market; that said search was made and the said goods seized, and the said vessel also seized, upon waters navigable from the sea by vessels of ten tons and upwards, and within the admiralty and maritime jurisdiction of the United States, and within the Southern District of New York." There is also a written admission that Captain Archibald Thomson "will swear that he was master of the steamship *Helvetia*, on the voyage in question, that he made up the manifest of the vessel, that the goods in question were not on it, that he had no knowledge or information, at any time, that said goods were on the vessel, and that he took all precautions in his power to prevent smuggling."

The 23d and 24th sections of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 645, 646), taken in connection with the 8th and 25th sections of the Act of July 18th, 1866 (14 *U. S. Stat. at Large*, 180, 184), provide, that no goods shall be brought into the United States from any foreign port, in any vessel, unless the master shall have on board a manifest in writing, containing a just and particular account of all the goods laden or taken on board, whether in packages or stowed loose, and that, if any goods shall be imported in any vessel, from any foreign port, without having such a manifest on board, or which shall not be included or described therein, or shall not agree therewith, in every such case the master shall forfeit and pay a sum of money equal to the value of the goods not included in the manifest, and that the

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vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily, by libel, to recover such penalty, in any District Court in the United States having jurisdiction of the offence; provided, that, if it shall be made to appear to the satisfaction of the Court in which a trial shall be had concerning such forfeiture "that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the master," and that the manifest was incorrect by mistake, such forfeiture shall not be incurred.

It was held by this Court in the case of *The Queen* 4 *Benedict*, 237), and has been held by the Circuit Court for the Eastern District of New York, in the case of *The Missouri*, on appeal (9 *Blatch*. 433), that a proceeding in admiralty for the enforcement in this case of the penalty against the vessel is proper. It was also held by this Court, in the case of *The Queen*, that a decree for the penalty could be rendered against the vessel, even though the penalty were not in fact enforced against the master. It was held by the District Court for the Eastern District of New York in the case of *The Missouri* (3 *Benedict*, 508), that proceedings against the vessel, under the Act, could be taken in the absence of any proceeding against the master or owner, and the Circuit court, on appeal, concurred in that view.

The only other point to be considered is, whether the fact that the master "had no knowledge or information at any time that said goods were on the vessel, and that he took all precautions in his power to prevent smuggling," affects what is otherwise a clear right to a recovery on the part of the United States against the vessel. I understand the Circuit Court, in the case of *The Missouri* (above cited), to have declined to adopt the proposition that a master can, in all cases, protect himself from the penalty and save the vessel from liability, by proof that

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he had not actual knowledge that the goods were on board. It says: "The statute makes no qualification. It declares that, if the goods are imported or brought in, and do not appear on the manifest, the forfeiture is incurred." The fact that the proviso to the 24th section of the Act of 1799 specifies certain cases in which the forfeiture shall not be incurred, taken in connection with the unqualified language preceding such proviso, is conclusive evidence to my mind that the forfeiture is to be incurred in all cases within such language where the exculpatory conditions of the proviso are not complied with. Showing that the master "had no knowledge or information" that the goods were on the vessel, does not tend to make it appear affirmatively, to the satisfaction of the Court, that the manifest was "incorrect by mistake," and was not incorrect by negligence, or that the want of knowledge or want of information was not itself negligent or even designed. The statement that the "master took all precautions in his power to prevent smuggling," is very vague. It imports no fact. He may have taken all precautions in his power, and yet have taken no precautions whatever, because disabled from some cause from exercising at the time any power to take precautions. The goods were found concealed in barrels which appeared to contain provisions, "and in other places." They consisted of silk in pieces, shawls, opera cloaks, silk umbrellas and other dry goods. It would seem that, if a searching officer found the goods, the master of the vessel ought to be able to show some better reason for not knowing or being informed that the goods were in the places where they were found, than merely that he had no such knowledge or information, and the general statement that he took all precautions in his power to prevent smuggling, if it is desired that the Court shall be satisfied affirmatively that the manifest was "incorrect by mistake." But, further, there is no compliance with the other part of the

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proviso, by making it appear that no part of the cargo of the vessel was unshipped, after it was taken on board, except such as was particularly specified and accounted for in the report of the master.

There must be a decree against the vessel for the \$654 92, with costs.

H. E. Davies, Jr. (Assistant District Attorney), for the United States.

C. Donohue and J. Chetwood, for the claimants.

APRIL, 1872.

IN THE MATTER OF JAMES M. ADAMS; A
BANKRUPT.

EXAMINATION OF WITNESS.—FORM OF OATH.

An attorney, who is called as a witness in a proceeding in bankruptcy, is not entitled to add to the oath which he takes a reservation of a right to refuse to answer any question on the ground of privilege as the attorney or counsel of the bankrupt.

ON the application of the assignee in bankruptcy in this case, a summons was issued to an attorney to appear as a witness. He appeared before the register on the 16th of March, 1872, and was sworn in these words: "I do solemnly swear that I will make true answer to all such questions as may be proposed to me respecting all the property of the said James M. Adams, the bankrupt above named, and all dealings and transactions relating thereto, and will make a full disclosure of all that has been done with the said property, to the best of my knowledge, information and belief; and that I will

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make true answers to all questions which may be put to me relating to the disposal or condition of the said property of the said bankrupt, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law, reserving my right to refuse to answer any question in regard to such matters on the ground of privilege as the attorney and counsel of said Adams, which I may not be able to answer except in consequence of my retainer as such attorney and counsel, and from information derived from my client as such." The examination was adjourned till the 18th of March, when the witness appeared. The assignee refused to proceed with the examination of the witness under the oath which he had taken. The witness then proposed to take an oath in the following form: "I, being duly sworn in regard to the matters now pending before the said register, say, &c." To this the assignee objected. The register certified the question to the Court.

BLATCHFORD, J. The proper form of oath is the first, without the reservation added to it. The assignee was right in declining to proceed with the examination of the witness under the oath administered March 16th, 1872, and in objecting to the witness being sworn in the form proposed by the witness.

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THE STEAMBOAT ELM CITY.

COLLISION NEAR HELL GATE.—STEAMBOAT AND SCHOONER.—LIGHTS.—
ESTIMATES OF DISTANCE.—MOVEMENT IN EXTREMIS.

A schooner, bound to New York, was beating through the East river against a light southwest wind, the tide being ebb, about midnight of July 18th, 1871. She alleged that, having fully beat out her tack, she was in stays close in under Negro Point Bluff, on Ward's Island, when a steamboat, bound from New York, ran into her, striking her on her port bow a blow, angling aft, which sank her. Both vessels had the regulation lights set, and both had lookouts stationed forward. The story of the steamboat was, that, as she rounded Hallett's Point, she saw the schooner's red light off her starboard bow; that shortly afterwards she saw both lights of the schooner, then about a quarter or a half a mile off; that very soon afterwards the schooner's red light disappeared, the green light remaining visible, whereupon the steamboat's wheel was starboarded to go under the schooner's stern, and her engine slowed; that thereafter the red light suddenly came into view again, indicating that the schooner had changed her course; and that thereupon the steamer stopped, but too late to avoid a collision:

Held, That, on the evidence, the pilot of the steamer mistook the distance he was from the schooner, when he starboarded to go between her and Ward's Island, and was then too near her to allow time for the schooner to get off on the other tack;

That the schooner made no change back to the port tack after having come about on the starboard tack;

That, although the schooner's jib was held up so as to keep her in stays, yet that did not contribute to the collision, and was done in the extreme peril and alarm consequent on the close approach of the steamboat head on;

That the steamboat was solely liable for the damages.*

BLATCHFORD, J. This libel is filed by the owners of the schooner Oscar C. Acken, and the owners of the cargo laden on board of her, to recover the damages caused by a collision which took place about midnight, on the 18th of July, 1871, between the schooner and the

* This decision was affirmed by the Circuit Court, on appeal.

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steamboat Elm City, off Negro Point Bluff, in Hell Gate, whereby the schooner was sunk. The steamboat was bound from New York to New Haven. The schooner, bound to New York, was beating down against a light southwest wind, the tide being the first of the ebb. The stem of the steamboat struck the port bow of the schooner, near the schooner's stem, a blow ranging in-board on the schooner a little, in a direction towards the schooner's main hatch.

The libel alleges, that, at the time of the collision, the schooner had beat fully across the channel, and was in stays close in under Negro Point Bluff; and that the collision was caused solely through the fault of those in charge of the steamboat, in that, among other things, she did not take a course that would have taken her to the southward of the schooner, or wait till the schooner had crossed to the southward, and then pass to the northward of the schooner, in not having a competent and proper lookout, and seeing the position of the schooner sooner and more accurately, in not sooner stopping and backing, and in otherwise not taking proper measures to avoid the schooner.

The answer avers, that, when the steamboat rounded Hallett's Point, she discovered the schooner's red light, bearing off the steamboat's starboard bow, such light being, as near as could be ascertained, somewhere abreast of, or to the eastward of, Negro Point Bluff; that both vessels continued on their respective courses, and, shortly after, the schooner exhibited both of her signal lights, green and red, she being, at that time, as nearly as can be stated, about abreast of Negro Point Bluff, and near the west shore, and from a quarter to a half of a mile distant from the steamboat; that, very soon thereafter, the schooner's red light disappeared and her green light alone remained visible, whereupon the steamboat's wheel was immediately hove to starboard, to go under the schooner's stern, between her and Ward's

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Island, and the bell was rung to slow, which was promptly answered, and the steamboat was slowed ; that, immediately thereafter, and suddenly and unexpectedly, both lights of the schooner again came into view, whereupon the steamboat was immediately stopped and backed, and every effort made, that could be, to avoid the collision, yet the vessels came together, the steamboat's stem striking the schooner on her port side, somewhere forward of the port fore-rigging, and the schooner sank ; that, from these various changes of the lights of the schooner, the pilot and those navigating the steamboat had reason to understand and believe, that, when they first saw the red light, the schooner was standing over towards Ward's Island, that, by the subsequent appearance of both lights, she was coming around upon the opposite tack, and that, by the disappearing of the red light, and the green light alone remaining visible, she had got around and was standing over towards Long Island ; that, at that time, if the schooner had kept on, there was abundant time and room for the steamboat to have passed under her stern in safety, the steamboat's wheel having been starboarded, and her speed slackened, to accomplish it ; that it was the duty of the schooner then and there to have held on her course towards Long Island, but, instead of so doing, she, without any excuse therefor, wrongfully and improperly changed her course, and came around again with her head towards Ward's Island, which brought her port side towards the steamboat, and so baffled the navigation of the steamboat as to render the collision inevitable ; and that the collision occurred by reason of the want of a proper and vigilant lookout on the schooner, and the erroneous and improper navigation on her part, and so changing her course, and thus baffling the lawful and proper efforts of the steamboat to keep out of her way.

The schooner had on board, at the time, her master, who was at the wheel, two seamen, who were forward,

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and a boy, 16 or 17 years old, who was steward. The master and the two seamen have been examined as witnesses for the libellants.

The master testifies, that he first saw the steamboat's red light when he was on his tack towards Long Island ; that the steamboat was, at that time, about at Hallett's Point ; that he tacked on the Long Island shore, and stood towards Ward's Island, keeping the steamboat's red light in view, until he had got about half way over towards Ward's Island, when he saw the green light and the red light of the steamboat, as if she had turned to come towards him ; that he stood over until within fifty feet of Ward's Island, and then tried to go about, the steamboat being, at that time, about 150 feet off, and still showing her green and red lights ; that, in order to go about, he put his helm hard-a-starboard and held it there until the steamboat was not twenty-five feet off, and then let go of his wheel, and stepped a distance of two feet to the cabin door and called to the steward to come up, and then went back and put his hand on the wheel just as the steamboat struck the schooner ; that the schooner, at the time of the blow, had got around nearly into the wind, so that her sails shook a little ; that he did not put his wheel to port at all ; that, when he let it go, it did not run back or move either way ; and that he heard two whistles from the steamboat when she was about 150 feet off.

Palmer, one of the seamen on the schooner, testifies, that he was standing forward on the starboard side ; that he first saw the steamboat's red light when the schooner was going about on the Long Island shore ; that, after the schooner had got a little more than half way across towards Ward's Island, he saw both of the colored lights of the steamboat ; that the schooner stood over towards Ward's Island as far as the eddy (elsewhere he says he supposes they began to go about when about fifty feet from Ward's Island, "may be more"), and then came

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up into the wind and lay there, and did not get off on the other tack, her sails shaking and she being right in the wind when the steamboat struck her ; that, when the steamboat was about twenty feet off, her two colored lights being visible, he started to go aft ; and that, just before he started to go aft, he heard the master call the steward. This witness states a fact which the master did not testify to, that, when the schooner came up into the wind, the master told him to let the jib swing amidships, and he did so, the effect being to keep the vessel from going about, and to let her lie in the wind. He says, that the schooner lay in the wind "a minute, may be," before she was struck ; that, if the jib had not been suffered to swing admidships, they could have about got around on the starboard tack, before being struck, but could not have cleared the steamboat ; and that the steamboat was 150 feet off when the schooner got into the wind.

Lockwood, the other seaman, testifies, that he first saw the steamboat's red light when the schooner was about half way across on her tack towards Long Island ; that, when the schooner was about half way across on her tack towards Ward's Island, he saw both of the colored lights of the steamboat ; that, when the schooner got over to the eddy, about fifty feet from Ward's Island, and the steamboat was about 150 feet off, and apparently coming right towards the schooner, her two colored lights and her white head-light being visible, the schooner came head to the wind, but did not go around on the other tack ; that, at the time the schooner got head to the wind, the steamboat was not over twenty or twenty-five feet off ; that he stood forward, looking out and not handling the sails, and did not go aft before the collision ; and that Palmer let the jib swing in when the steamboat was not over twenty-five feet off.

The sequence of events, as set up in the answer, is,
(1) red light of the schooner seen off the steamboat's

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starboard bow ; (2) both of the colored lights of the schooner seen, when the schooner was from a quarter to a half of a mile off ; (3) the schooner's red light disappeared, her green light remaining visible, whereupon the steamboat starboarded and slowed ; (4) both of the colored lights of the schooner again seen, whereupon the steamboat stopped and reversed.

The pilot, who was at the wheel, two wheelmen, who were also at the wheel, the lookout, and the engineer, have been examined from the steamboat.

Stephens, the pilot, testifies, that, on turning Hallett's Point, he discovered the red light of the schooner on his port bow ; that, just as the steamboat was on the turn at Negro Point, the schooner showed both of her colored lights, being somewhere near a quarter of a mile off, and the lights bearing on the port bow of the steamboat ; that he then starboarded and slowed, so as to go between the schooner and Ward's Island ; that the next thing he observed, in reference to the schooner's lights, was, that she shut in her red light, leaving her green light alone visible ; that the next thing he observed, in regard to the schooner's lights, was, that she showed both of her colored lights again ; that he then rang to stop and back, and blew two whistles ; and that the schooner was gradually swinging towards Ward's Island, when she was struck. On cross-examination, he says, that he had turned Negro Point, and got headed up the river, when he first saw the two lights of the schooner, the steamboat being then in about the middle of the river ; that the schooner might, perhaps, have been 150 feet off, when she showed both of her colored lights the second time ; and that, just before that, her green light bore off the starboard bow of the steamboat, the steamboat being on a swing to port. He also says, that, at the time of the blow, the schooner's green light had disappeared, and her red light alone was visible ; that the schooner must have swung off with her head towards

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Ward's Island, in order to have been struck as she was ; that, when he rang to stop and back, he had stopped the swinging to port, by steadying the helm ; that the stopping and backing swung the steamboat's head a little to starboard, but he did not change his helm when he stopped and backed ; and that the vessels were too close together for porting by the steamboat, at the time she stopped and backed, to have been of any service.

Burt, one of the wheelmen, states, that, after seeing the schooner's red light, he saw both of her colored lights ; that then the steamboat's wheel was starboarded, and she was slowed, the schooner being about a quarter of a mile off ; that afterwards the schooner shut in her red light, and showed her green light alone ; that then the wheel of the steamboat was let run amidships ; that next both of the colored lights of the schooner became visible, and the steamboat was stopped and backed, the schooner being then over 200 feet off ; that the wheel of the steamboat was not again changed ; that afterwards, and before the blow, the schooner's green light was shut in, her red light remaining visible ; that, if the steamboat had ported when she stopped and backed, she would not have cleared the schooner ; and that the schooner, when hit, was swinging towards Ward's Island.

Wedmore, the other wheelman, testifies, that, after the schooner showed her red light, she showed both of her colored lights, being then about a quarter of a mile off ; that then the steamboat starboarded and slowed ; that, after that, the wheel of the steamboat was steadied ; that after the schooner showed both of her colored lights, she next shut in her red light, her green light remaining visible ; that next she showed both lights again, and then the steamboat was stopped and backed, when the schooner was 200 feet off ; and that, when struck, the schooner was gradually swinging towards Ward's Island, and had shut her green light in.

Grant, the lookout, says, that he stood about fifteen

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feet abaft the stem of the steamboat; that he reported the schooner as a sail off the port bow; that the schooner, after showing her red light, showed both of her colored lights, and then shut in her red light, her green light remaining visible, and then showed both of the lights again, when the steamboat was close to her; that, when struck, the schooner was swinging towards Ward's Island; that, when he first saw both of the schooner's colored lights, the vessels were, he should think, 150 or 175 feet apart, or, it might have been, further; and that, when he saw both of her colored lights the second time, the vessels were somewhere in the neighborhood of ten or twenty feet apart.

The engineer of the steamboat says, that the steamboat made between two and two and a half turns back, before the blow, it taking about four turns back to stop her headway when going slowed.

It cannot escape observation, that there are some discrepancies between the answer and the evidence of the witnesses from the steamboat. The answer states, that the red light of the schooner, when discovered, bore off the starboard bow of the steamboat; while the evidence is, that it bore off the port bow. A more important discrepancy is, that the answer sets up that the steamboat starboarded and slowed when, and not until, the schooner's red light was shut in; while the pilot and the two wheelmen of the steamboat say that the steamboat starboarded and slowed when the schooner showed her two colored lights, and before she shut in her red light. The evidence makes the starboarding and slowing of the steamboat to have taken place when the vessels were further apart than they were if such starboarding and slowing did not take place till the time stated in the answer.

There is also a discrepancy, in a very important particular, between the testimony of the lookout on the steamboat and the testimony of the three persons who

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were in the pilot house of the steamboat. The latter testify, that, when the schooner first showed both of her colored lights, and the steamboat starboarded and slowed, the schooner was about or somewhere near a quarter of a mile off, that is, 1,320 feet off. The place where these observers were was some distance back from the bow of the boat, where the lookout was stationed, and was higher from the water. The lookout was fifteen feet abaft the stem, and gives his judgment of the distance apart of the vessels, when the schooner first showed both of her colored lights, as 150 or 175 feet, although, he says, it might have been further. The master of the schooner says, that, 'when he began to go about, the steamer was about 150 feet off. Palmer, one of the schooner's seamen, testifies, that the steamboat was 150 feet off when the schooner got into the wind; and Lockwood, the other one of the schooner's seamen, says, that the steamboat was about 150 feet off when the schooner came head to the wind. Until the schooner got pretty well around to the wind, she would not show her green light to the steamboat.

So, there is another important discrepancy between the testimony of the lookout on the steamboat, and that of her pilot and her two wheelmen. The pilot says, that, when the schooner showed both of her colored lights the second time, and the steamboat stopped and backed, the schooner might, perhaps, have been 150 feet off; Burt says, over 200 feet off; Wedmore says, 200 feet off; and the lookout on the steamboat says, somewhere in the neighborhood of ten or twenty feet off. The master of the schooner says he did not let go his hard-a-starboard wheel till the steamboat was within twenty-five feet off, and that when he let it go he called the steward. He gives the distance off of the steamboat, when he heard her two whistles, as 150 feet. They were blown when the pilot rang to stop and back. Palmer says, that he started to go aft when the steamboat was about

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twenty feet off, and that just before he started to go aft he heard the master call the steward. Lockwood says, that the steamboat was not over twenty or twenty-five feet off when the schooner got head to the wind.

Estimates of the distance of lights, especially colored lights, seen across water, are of very little value to show their real distance. But the testimony, in this case, indicates, that, whatever the distance was, the lookout on the steamboat thought that the schooner was much nearer when she showed both of her colored lights and the steamboat starboarded and slowed, than the men in the pilot house of the steamboat thought she was, and much nearer when the steamboat stopped and backed than the men in the pilot house of the steamboat thought she was. The testimony also indicates, that the men on the schooner thought the steamboat was much nearer, when the schooner got into a position to show both of her colored lights, than the men in the pilot house of the steamboat thought she was.

I am impelled to the conclusion, from all the evidence, that the pilot of the steamboat mistook the real distance off of the schooner, when he starboarded ; that he starboarded and slowed instead of starboarding and stopping, or instead of stopping without starboarding, or instead of porting, under the mistaken idea that he was so far away from the schooner that he would have room, after she got about and off on her starboard tack, to go under her stern ; that he ran on, under a starboard wheel, until he got so near to Ward's Island that he was obliged to steady his helm ; and that then he found himself so close to the schooner that he could not avoid her, and had no time to port, but could only ineffectually stop and back. This starboarding of the steamboat, and her continuing to run directly head on towards the schooner, was, on the evidence of the steamboat's own witnesses, the result of the schooner's coming about so far as to show both of her colored lights, and, perhaps,

to shut in her red light. Nothing is complained of by the steamboat as against the schooner, except that the schooner, after shutting in her red light, showed it again with the green. But the evidence from the schooner as to what, in fact, was done on board of her, shows, that it was done in the extreme peril and alarm of the close approach of the steamboat, head on, both of her colored lights visible; and the entire evidence fails to show satisfactorily that anything done on board of the schooner contributed to the collision. It was the duty of the steamboat to avoid the schooner, and, not having done so, to show a clear excuse for not having done so. I think she fails to establish such excuse.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

R. D. Benedict, for the libellants.

E. H. Owen, for the claimants.

MAY, 1872.

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TOBACCO, &c.

INTERNAL REVENUE.—TAX ON TOBACCO.—PRETENDED AND ACTUAL
SALE.—EVIDENCE OF PREVIOUS EVASIONS OF THE REVENUE
LAW.—INTENT.

Under the 90th and 94th sections of the Internal Revenue Act of June 30, 1864 (13 *U. S. Stat. at Large*, 224), as amended by the Act of July 13, 1866 (14 *Id.* 150), and the 61st and 84th sections of the Act of July 20, 1868 (15 *Id.* 152,

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153), a completed sale or a completed removal of manufactured tobacco is a necessary preliminary to the accruing, assessment and payment of the tax upon it.

But the provision in the 48th section of the Act of 1864, as amended by the Act of 1866, which provides for the forfeiture of goods "on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws," does not require that there should have been a completed sale or removal of such goods.

The provision in the said 48th section, in respect to the forfeiture of raw materials, is not dependent on the provision in regard to taxable articles, so as to make the forfeiture of the raw materials dependent on their being seized in the possession of a person in whose possession forfeitable taxable articles are found.

Under the said 48th section the *corpus delicti* is the possession of the specified property with the specified fraudulent purpose or design, without the doing of any overt act in respect of it.

Evidence of the manifestation of a like fraudulent intent at prior times, in respect to kindred matters, may be offered to prove the existence of the fraudulent purpose or design mentioned in the 48th section, as to the articles in question.

Under the 24th section of the Act of June 30, 1864, above cited, as amended by the 9th section of the Act of July 13, 1866, tobacco made of leaves from which part of the stems had been removed, and to which an equal proportion of other stems, prepared in a certain way, had been added, and which had not been sweetened, was taxable at forty cents a pound, after the 1st of August, 1866.

A manufacturer of tobacco made a pretended sale of a quantity of tobacco on the day before an Act increasing the tax on it went into effect, and paid the tax as on a sale. The increased tax went into operation, and was afterwards reduced again below the former rate. After the reduction he sold the tobacco, but made no return of the sale and paid no tax on it:

Held, That the transaction was illegal, and that the manufacturer had no right to pay the tax when he did.

It was also the course of business, in his establishment, to remove from the wholesale department to the retail department a quantity of tobacco at once, and to make a return and pay tax on it as one sale, and not to make any record, or return or pay any tax on the actual sales of it in the retail department:

Held, That this was an illegal mode of doing business, and that it was for the jury to say what was the intent of the manufacturer in adopting that mode.*

BLATCHFORD, J. The first four grounds urged, on the part of the claimant, as a reason for granting a new trial in this case, are, that the Court erred "in instruct-

* This decision was affirmed by the Circuit Court, on appeal.

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ing the jury that they could find a verdict in favor of the United States on the issue made by the information and answer, without any proof, on the part of the United States, tending to show that any taxes had become due, or had been imposed, upon the manufactured tobacco seized on the claimant's premises, and without any proof, on the part of the United States, tending to show that the claimant had sold, or removed from his premises for consumption, or was, at the time of the seizure, engaged in selling or removing from his premises for consumption, any of the manufactured tobacco so seized;" and "in instructing the jury, in the absence of any proof that taxes had become imposed on the said manufactured tobacco, and that the claimant had sold or removed, or was engaged in selling or removing, any part of the same, without paying such taxes, that the jury could infer, from previous alleged evasions, or attempts at evasions, of the revenue laws, by the claimant, an intent to sell or remove the said manufactured tobacco without paying the taxes that might become due thereon, and, from such intent, so found, find a forfeiture of the said manufactured tobacco so seized as aforesaid;" and "in instructing the jury, in the absence of any proof that the claimant had sold or removed, or was engaged in selling or removing, any manufactured tobacco on which taxes had been imposed by law, without paying, and without intending to pay, the said taxes, that they could infer, from previous alleged evasions, or attempts at evasion, of the revenue laws, by the claimant, a purpose to sell or remove the manufactured articles which he might thereafter make from the raw materials seized, without paying the taxes that would become due thereon, and, from such purpose, so found, find a forfeiture of the said raw materials;" and "in refusing to give to the jury the instructions prayed for in the 13th and 14th of the claimant's prayers for in-

structions, and in giving to the jury the 1st and 2d of the instructions prayed for by the District Attorney.”*

The 13th and 14th of the claimant's prayers for instruction were as follows: “13. That there is no evidence, in this action, that, at the time of the finding or seizure of the property in this action, the claimant had not paid all the taxes due on all the goods, wares, merchandise, articles, or objects, which had been, before that date, manufactured at his factory and sold or removed therefrom. 14. That there is no evidence, in this action, that any goods, wares, merchandise, articles or objects on which taxes were imposed by the provisions of law, manufactured at the factory of Mr. Lilienthal, were ever sold or removed by him, or by any other person, in fraud of the internal revenue laws, or with design to avoid payment of said taxes.”

The prosecution in this suit is founded on that part of the 48th section of the Act of June 30th, 1864, as amended by the 9th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 111), which is in these words: “All goods, wares, merchandise, articles, or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district * * * and the same shall be forfeited to the United States; and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and also all

* For the 1st and 2d instructions prayed for by the District Attorney, and here referred to, see 5 *Benedict*, pp. 137-139.

tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure, where such articles, or such raw materials, shall be found, may also be seized by any collector, or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid." It is claimed that the Court put an erroneous construction upon these provisions of the 48th section, in its charge to the jury.

The point of the objection to the construction which the Court gave to the section is, that the fact, or the *corpus delicti*, to be proved, under the section, is not a mere state of mind, or intent, on the part of the person in whose possession the goods, &c., or the raw materials, are found, to commit, at some time, the wrongful act, as against the Government, specified in the section, but is the doing of a certain act, with a certain intent. It is conceded, that, if merely such intent is the thing to be proved, the evidence given in this case as to the former wrongful acts and omissions on the part of the claimant, was not only competent, but was sufficient, if believed by the jury, to establish the intent mentioned in the section and averred in the information. The trial was conducted throughout on the principle, that, to recover, it was only necessary for the Government to prove the possession by the claimant, at the time of the seizure, of the manufactured goods and the raw materials, and the finding, in the prescribed situation, of the other personal property proceeded against, and the fact that the manufactured goods were taxable goods, and that the claimant intended to manufacture the raw materials into taxable goods, and that he had the fraudulent intent specified in the section in respect to such taxable goods, manufactured and to be manufactured. It is contended that this view of the statute is erroneous; that the proper construction of so much of the section as precedes the provision in regard to raw materials is, that, when any goods, &c., such as are described, have

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had taxes imposed on them by the operation of the law, they shall be forfeited if they are sold or removed without the payment of such taxes ; that, by the 94th section of the Act of June 30th, 1864, both as it originally stood (13 *U. S. Stat. at Large*, 264), and as amended by the 9th section of the Act of July 13th, 1866 (14 *Id.* 128), taxes do not become payable on manufactured tobacco, until it is sold, or consumed or used by its manufacturer, or removed for consumption, or for delivery to others than agents of the manufacturer within the United States, and, by the 90th section of the said Act of June 30th, 1864, as amended by the 9th section of the said Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 125), the tax imposed on the manufacturer of tobacco, snuff and cigars, is held to accrue upon the sale or removal from the place of manufacture, unless removed to a bonded warehouse ; that the words, in the 48th section, “ found in the possession, or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons,” are equivalent to the words “ found in the act of being sold or removed,” because the tax is imposed in consequence of the sale or removal, and not in consequence of the existence of the purpose to sell or remove ; that there must have been a sale or removal, or the goods must be found in the act of being sold or removed, for them to be in the condition prescribed of being goods “ on which taxes are imposed by the provisions of law ;” that there can be no purpose to sell or remove in fraud of the law, or with design to avoid the payment of taxes, without an overt act of sale or removal done or attempted, because the overt act of sale or removal is what causes the taxes to be imposed, and the taxes the payment of which it is supposed there is a design to avoid, are taxes which have accrued or are accruing by the act of sale or removal ; that, as a mere purpose in regard to sale or removal does not impose taxes on the goods, and no taxes are imposed until there

is an act of sale or removal, done or attempted, the words, "avoid payment of said taxes," can only apply to taxes which have become payable; that a purpose to defraud the revenue of something can only exist in respect to something to which the revenue is at the time entitled; that, in respect to so much of the 48th section as relates to raw materials, and to tools, &c., the provisions mean, that, where a case of forfeiture exists, as specified in the preceding part of the section, in respect to goods on which taxes have become payable, not only may such goods be forfeited, but also all raw materials found in the possession of the same person in whose possession such goods are found, he intending to manufacture such raw materials into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax, and also all tools, &c., in the place, &c., where such articles or such raw materials are found; that the clauses making up the provisions for forfeiture are not to be read disjunctively, but connectedly, the forfeitures being connected with each other and succeeding each other, when manufactured articles, raw materials, and tools, &c., are seized in the hands of the same person; and that the purpose of the Act is to have a statute applicable to all manufacturers whose productions are liable to pay taxes, whereby, whenever any taxes have become due on any of the manufactured articles, and they have become liable to seizure and forfeiture under the 48th section, in the hands of the manufacturer, not only may they be seized, but his raw materials may be seized and forfeited, if his intent is to make them into taxable articles, and to sell or remove such articles without paying the tax on them, and all tools, &c., found on the same premises, may be seized and forfeited.

In support of the views urged on the part of the claimant as to the proper construction of the 48th section, it is alleged, that, if that section makes a mere intent

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a cause of forfeiture, it is the first time, in the history of such legislation, that a mere intent has been made a cause of forfeiture. It is also urged, that there is no reason to suppose that Congress intended to make the possession of property, the mere possession of which generally is innocent, coupled with an intent to do something wrongful with it at some future time, a cause for the forfeiture of such property; and that a statute which should authorize the seizure and forfeiture of such property, on proof merely of an intent to violate the law in dealing with it in a certain manner at a future time, would be an unreasonable seizure, and in violation of the fourth amendment to the Constitution of the United States.

Not only does the 90th section of the Act of 1864, as amended by the Act of 1866, before referred to, provide, that "the tax imposed upon the manufacturer of tobacco, snuff and cigars, shall be held to accrue upon the sale or removal from the place of manufacture, unless removed to a bonded warehouse," but the 61st section of the Act of July 20th, 1868 (15 *U. S. Stat. at Large*, 152, 153), provides, that "upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be collected and assessed the following taxes," and the 81st section of the last named Act (*Id.* 160), contains the same provision in regard to cigars. So, also, by the 94th section of the Act of 1864, as amended by the Act of 1866, before referred to, taxes do not become payable on any of the manufactured articles specified in that section, until they are sold, or consumed or used by the manufacturer, or removed for consumption. It is quite apparent, from these provisions, that a completed sale, or a completed removal, of the manufactured article, is a necessary preliminary to the accruing, assessment and payment of the tax upon it. Until such completed sale or completed removal has taken place, the manufacturer is not compellable to pay the tax, and it has not accrued so as to be capable of being assessed and

collected. If, then, the words "taxes are imposed," in the 48th section, require that the taxable article shall have been sold or removed, so as to cause the tax to have accrued and to be payable upon it, and if those words are equivalent to the words "have accrued and become payable," it is difficult to see how such article can ever be found in the hands of its manufacturer, with the intent to sell or remove it with design to avoid payment of the tax, so as to be subject to forfeiture in his hands, under that section. The section would, under such circumstances, be wholly inapplicable to manufactured articles in the hands of their manufacturer, where the application of the section is most beneficial, and would only apply to such articles after they had gone into the hands of purchasers from him.

The meaning of the words "taxes are imposed," as used in the 48th section, may be deduced from the meaning of the word "imposed," and of kindred words, where used in other portions of the internal revenue laws. Thus, the language, before cited, of the 90th section of the Act of 1864, as amended by the Act of 1866, is, that "the tax imposed" on the manufacturer of tobacco shall "be held to accrue upon the sale or removal from the place of manufacture." Here, the word "imposed" clearly means "declared to be collectable." The tax declared to be collectable on manufactured tobacco is to be held to accrue and become assessable and payable, on the sale or removal of such tobacco from the place of manufacture. In analogy to this use of the word "imposed," it is proper to say, that, where, in the 48th section, the words "articles on which taxes are imposed by the provisions of law" are used, they mean "articles on which taxes are, by the provisions of the law, declared to be collectable, when such articles shall be sold or removed."

Again, the provisions of a subsequent part of the 48th section show what the word "imposed" means, in

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the previous part of that section, and what the words "subject to tax" mean, in the clause in reference to raw materials intended to be manufactured "into articles of a kind subject to tax." The section, after the forfeiture clauses, proceeds to say: "Any person who shall have in his custody or possession any such goods, wares, merchandise, articles, or objects, subject to tax, as aforesaid, for the purpose of selling the same, with the design of avoiding payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudulently attempted to be evaded, to be recovered in any Court of competent jurisdiction." If, in this clause, the words "articles subject to tax" are held to mean "articles on which taxes have accrued and become payable, because of a sale or removal," the clause can have no applicability to a manufacturer of the articles. But, the good sense of the words means "articles on which taxes are declared to be collectable," and, in respect to those, if the purpose exists of selling them with the design of avoiding payment of the taxes "imposed thereon," that is, payment of the taxes declared to be collectable thereon, the penalty attaches. So, the raw materials are materials intended to be manufactured into articles of a kind on which taxes are declared to be collectable. There is every reason to suppose that the word "imposed," in respect to taxes on articles, in the two places in which it is used in the 48th section, and the words "subject to tax," in respect to articles, in the two places in which those words are used in that section, mean the same thing; and there is no reason to suppose the contrary. If that be so, then the words "subject to tax" cannot mean "on which taxes have accrued and become payable because of sale or removal," because, in respect to the clause regarding raw materials, the manufactured articles have no existence, so as to be taxable. The fact, that the expression is "articles of a kind subject to tax,"

can make no difference, for, the second time the words "subject to tax" are used, the expression is "subject to tax as aforesaid," and the only time the expression "subject to tax" is previously used in the section is in the form of words "of a kind subject to tax."

In order to maintain the theory of the claimant, that the words "are imposed" mean "have accrued and become payable," it is also necessary that the further view should be maintained, that the three clauses of forfeiture are to be read connectedly, and not disjunctively. But, it would seem to be a conclusive objection to reading the clause in regard to raw materials otherwise than disjunctively in respect to the first clause, that the clause in regard to raw materials says, "all raw materials found in the possession of *any* person or persons," &c., and does not say, "all raw materials found in the possession of *such* person or persons," &c., referring to the person or persons in whose possession the articles on which taxes are imposed are found.

The words of the statute are, "on which taxes are imposed by the provisions of law." It is reasonable to suppose that the word "imposed," in the connection in which it is found in this clause, is used in the same sense in which it is used, in a like connection, in other provisions of the same statute, and in kindred provisions of other revenue laws. On examination, it will be found, that the word "imposed," in such connection, is not used in the Act of June 30th, 1864, and in other revenue laws, in the sense contended for by the claimant. The 173d section of the Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 304), speaks of "the duty imposed by any existing law," and of no duty having been "imposed" "by any former Act," and of the duty "imposed" "by the terms of this Act;" and the same terms are used in the 70th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 173). The 176th section of the said Act of 1864 (*Id.* 305) speaks of a "tax or duty" "imposed by law."

The 96th section (*Id.* 272) speaks of materials "upon which no duties have been imposed by law." The 97th section (*Id.* 273) speaks of "duties imposed by law enacted subsequent" to the making of a contract, on articles to be delivered under such contract. The 16th section of the Act of March 3d, 1865 (*Id.* 486) speaks of the "duty imposed by any previous Act." Section 10 of the Act of July 13th, 1866 (14 *Id.* 150) provides, that "no manufactured wire shall pay a greater tax than that imposed on number twenty wire gauge." Section 11 of the Act of March 2d, 1867 (*Id.* 476) speaks of the "taxes now imposed by law" on manufactures of iron. The 1st section of the Act of March 2d, 1867 (*Id.* 559) speaks of "the duties now imposed by law" on the articles mentioned in that section; and the 2d section of the same Act (*Id.* 561) speaks of "the duties heretofore imposed by law" on certain articles. The language, before referred to, of the 90th section of the Act of June 30th, 1864, as amended by the 9th section of the Act of July 13th, 1866 (*Id.* 125), is very marked, in this respect, where it says, that "the tax imposed upon the manufacturer of tobacco" "shall be held to accrue upon the sale or removal from the place of manufacture," clearly showing that, when the tax or duty is spoken of as "imposed" by the statute, that means that it is declared to be collectable when some event specified shall occur, although the tax or duty does not accrue or become payable on the particular article until the occurring of the event. Many similar instances could be referred to, of such use, in revenue laws, of the words "imposed by the provisions of law," and like words, in respect to taxes and duties.

A use of the words "subject to duty or taxation under the provisions of this Act," analogous to the use, in the 48th section, of the words "subject to tax," may be found in the 37th section of the Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 238), where provision is

made that revenue officers may enter, in the day time, all places where any articles "subject to duty or taxation under the provisions of this Act are made, produced, or kept, to examine them, or the accounts required to be kept by their manufacturer respecting them." Under this provision, most certainly, the officers are not restricted to entering a tobacco manufactory, only when the articles made there have been sold or removed, so that the tax has accrued on them.

A reading of the 48th section, giving the usual accepted meaning to the words found therein, seems to me to lead conclusively to the view, that Congress intended to forfeit taxable articles, when held, especially by their manufacturer, for the purpose of being sold or removed in fraud of the revenue laws, or with design to avoid the payment of the taxes which would accrue thereon by reason of such sale or removal, and also to forfeit all raw materials when held by a person intending to manufacture them into taxable articles for the purpose of fraudulently selling such articles, or with design to evade the payment of the taxes which would accrue thereon when sold or removed, and also to forfeit all personal property found in the place where any such articles, or any such raw materials, are found; and that possession, with the specified purpose, design or intent, is all that is necessary to work the forfeiture. The provision, in the same section, that the possession of the taxable articles, for the purpose of selling them, with the design of avoiding payment of the taxes, shall subject the possessor to a penalty of not less than double the amount of taxes fraudulently attempted to be evaded, is in harmony with the provisions in regard to forfeiture. The possession for such purpose renders the possessor liable to a penalty of double the amount of the taxes which, on a sale, would accrue on the articles. Such taxes are fraudulently attempted to be evaded when the articles are held for such purpose.

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The legislation of Congress on the subject shows a uniform design in harmony with this view. The 114th section of the Act of July 1st, 1862, the first internal revenue Act (12 *U. S. Stat. at Large*, 487), provided, that "all articles upon which duties are imposed by the provisions of this Act, which shall be found in the possession of any person or persons, for the purpose of being sold by such person or persons in fraud thereof, and with the design to avoid payment of said duties, may be seized by any collector or deputy collector who shall have reason to believe that the same are possessed for the purpose aforesaid, and the same shall be forfeited to the United States; * * * and any person who shall have in his possession any such articles, for the purpose of selling the same, with the design of avoiding payment of the duties imposed thereon by this Act, shall be liable to a penalty," &c. The 48th section of the Act of June 30th, 1864, as originally passed (13 *U. S. Stat. at Large*, 240), carried out the same principle, by re-enacting the provisions of the 114th section of the Act of 1862, and extending them, by providing for the forfeiture of raw materials intended to be manufactured into articles to be sold in fraud of the internal revenue laws, or with design to evade the payment of duties imposed by the provisions of law, and for the forfeiture of all personal property found in the same place with the articles on which duties are imposed, and intended to be used by the possessor of such raw materials in the fraudulent manufacture of such raw materials. The section was amended by the Act of July 13th, 1866, to read as before recited, being made more stringent as respected personal property, so as to cover all personal property found in the same place with either the articles or the raw materials, and without reference to the intended use of such personal property.

No direct adjudication is found as to the construction of this section, in respect to the point taken by the

claimant. Yet many condemnations have been decreed under it, both in this Court and in other Courts, where the point was as open and proper to be taken as in this case. But it does not seem to have been raised. There are, however, several cases where the language of the Court indicates the view taken by it of the general scope of the section. In *United States v. One Still, &c.* (5 *Blatchf. C. C. R.* 403), Mr. Justice Nelson says, that the 48th section is very comprehensive, and was so designed, and that the reason for the seizure of the articles on which taxes are imposed by law, and of the raw materials, is, "for the fraudulent intent of the person in the possession or control of them, that is, an intent to defraud the public revenue by evading the tax." In *United States v. Thirty-six Barrels* (7 *Blatchf. C. C. R.* 459), Judge Woodruff says, that the object of the 48th section is "to enable the Government to anticipate and prevent the sale or removal, and to proceed to a forfeiture before the overt act of fraud is perpetrated;" that "it is enacted in view of the very great difficulty, if not impracticability, of following distilled liquors, after sale or removal, or of identifying them, if found, and, also, in view of the ease with which they may be passed into the hands of *bona fide* purchasers;" that "the fraudulent intent or design" of the person in possession of the spirits "is the cause of forfeiture;" that the object of the statute is to "prevent the accomplishment of meditated evasion and fraud;" that "it should be construed, so far as a fair interpretation of its language will permit, in a manner adapted to effect the purposes of its enactment;" that the section "has respect to the intentions, purposes, and designs of the party" in possession, which intentions, purposes, and designs are "the ground of the forfeiture, entirely irrespective of the difficulties which may lie in the way of accomplishing his intention;" and that the terms of the section must not receive "a narrow construction,"

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“not called for by their fair, natural, and legal meaning,” but must be construed “so as most effectually to accomplish the intention of the Legislature in passing it.” The principles laid down by the Supreme Court of the United States, in its decision in the recent case of *United States v. 100 Barrels* (14 *Wallace*, 44), seem to me to fully sustain the construction I place upon the provisions of the 48th section.

There seems to me to be no warrant for saying that there is any evidence to be found, in the 48th section, of any intention to make the provision in regard to raw materials dependent upon, and connected with, the provision in regard to taxable articles, and to make a forfeiture of the raw materials depend upon their being seized in the possession of a person in whose possession forfeitable taxable articles are found. The language manifests a plain intention that all raw materials found in the possession of any person who intends to manufacture them into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of taxes thereon, shall be seized and forfeited, without reference to the question whether manufactured articles of a kind subject to tax are or are not found in the possession of the same person. In such case, all personal property whatsoever, found in the same place, building or inclosure where the raw materials are found, may be seized and forfeited. In the present case, the raw materials were found in the possession of the claimant, and the bill of exceptions states that there was evidence tending to show that he intended to manufacture them into articles of a kind subject to tax by the provisions of the internal revenue law in force at the time, and shows that evidence was given tending to show that the claimant had the purpose of fraudulently selling the manufactured articles to be made out of such raw materials, and designed to evade the payment

of the taxes thereon. Such evidence was, in my judgment, sufficient to warrant the verdict condemning the raw materials. If they were properly condemned, then all the taxable manufactured articles, and other items of property, that were seized, were properly condemnable under the description of "all personal property whatsoever," because they were found in the same place with such raw material. In this view, it is of no importance whether any manufactured articles on which taxes had in fact accrued, were or were not found in the possession of the claimant.

• Criticism is made on the fact, that the information, after averring the seizure, states that, "prior to said seizure, taxes were imposed, by the provisions of law, upon the said tobacco," that is, the manufactured tobacco, "and the same, being so subject to the payment of taxes as aforesaid, were found," &c. ; and, it is urged, that this language of the pleader shows that he interpreted the 48th section as requiring that taxes should have accrued and become payable on such manufactured tobacco, and that, having alleged this fact, it ought to have been proved, and was not proved. But the averment is not fairly susceptible of this interpretation. It goes on to say that such tobacco was found in a certain possession, for a specified purpose, against this 48th section. It refers to the section as the foundation of the forfeiture. As the section does not require that the tax should have accrued or become payable, the words "subject to the payment of taxes as aforesaid," having reference solely to the expression immediately preceding, that taxes were imposed on the tobacco by the provisions of law, are equivalent to no more than the expression "subject to tax as aforesaid," which, as has been shown, is only a synonym for the words "on which taxes are imposed by the provisions of law." The allegation, that, "prior to said seizure, taxes were imposed by the provisions of law" on the manu-

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factured tobacco seized, is equivalent to no more than the allegation, that, when such tobacco was seized, it was an article of a kind on which, under the law, a tax could accrue without its being further manufactured.

Legislation equally stringent with that found in the 48th section, for the purpose of preventing meditated fraud, is to be met with in various parts of the internal revenue laws. The 43d section of the Act of July 20th, 1868 (15 *U. S. Stat. at Large*, 142), provides, that any railroad company, or transportation company, or person, who shall have in possession, with intent to transport, or to cause or procure to be transported, any empty distilled spirits cask having on it a brand or stamp required by law for a cask containing distilled spirits, shall forfeit \$300 for each such cask had in possession with such intent. The 72d section of the same Act (*Id.* 156), provides, that any person who shall give away or accept any empty stamped tobacco- or snuff-box, shall be fined \$100 and imprisoned for not less than twenty days and not more than one year. The 89th section of the same Act (*Id.* 162), provides, that any person who shall receive, give away, or have in his possession, any cigar tax stamp removed from any box of cigars, shall be deemed guilty of a felony, and fined not less than \$100 nor more than \$1,000, and imprisoned not less than six months nor more than three years.

As, under the 48th section, the *corpus delicti*, and the only one, is the possession of the specified property, with the specified fraudulent purpose or design, without the doing of any overt act in respect of it, there is no reason why the general principle, that intent may be proved by proving manifestations at prior times of like fraudulent intent in respect of kindred matters, should not be applied to the proving of the fraudulent purpose or design mentioned in the 48th section. In *Wood v. United States* (16 *Peters*, 342, 361), it is said, that, whenever a fraudulent intention is to be established, collateral facts

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tending to show such intention are admissible proof. The principle was applied by Judge Woodruff, in *United States v. 36 Barrels (7 Blatchf. C. C. R. 469)*, and in *United States v. 18 Barrels (8 Id. 475)*. In the present case the seizure took place on the 25th of March, 1868, and the testimony as to the intent of the claimant in respect of the taxable tobacco and the raw materials seized, was entirely testimony in respect to previous acts of omission and commission in his establishment, in conducting its business, in its relations to the internal revenue laws, which acts were claimed to have been in violation and fraud of such laws, and to have had in them a fraudulent intent on the part of the claimant. Those acts are concisely summed up in the two requests to charge on the part of the Government. They consisted of a failure to keep the required account of tobacco and snuff manufactured from August, 1866, to January, 1868; of the removal for sale; and the removal from the place of manufacture, during that period, of quantities of tobacco and snuff, without any account thereof being kept, as of removals, and without any accurate account of the tobacco so received being kept in the statutory books; of the sale, during that period, of large quantities of manufactured tobacco, without any account of such sales, as sales, being kept in such books; of the sale and removal from the claimant's premises, during all but the last month of that period, of quantities of purchased manufactured tobacco, without any accurate account of such sales or removals being kept in such books; of the rendering to the assistant assessor, during the whole of that period, of untrue and inaccurate abstracts of such sales and removals; of the manufacture of much more chewing tobacco and fine cut shorts in the claimant's manufactory, during 1867, than was declared, on such abstracts, to have been manufactured; of the sale and removal, during 1867, of a large quantity of smoking tobacco, manufactured on said premises, which was not

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returned for taxation on said abstracts, and of which no account was contained therein or in the statutory books; and of certain acts of the claimant (set forth in the second request to charge on the part of the Government, before recited) in respect to the manufacture of "extra long smoking tobacco," and in respect to returning it for taxation, during the period before mentioned, evincing not only a purpose of selling and removing such tobacco in fraud of the internal revenue laws, and an intent to evade the payment of taxes thereon, but resulting in the commission of such fraud and the evasion of the payment of a large amount of taxes. In respect to all of these acts, except those relating to the "extra long smoking tobacco," the Court charged the jury, that, if they believed such acts were done by the claimant, the burden of proof was on the claimant to satisfy them that the tobacco so manufactured on his premises, and sold or removed without due account, return or entry being made thereof in such books and abstracts, in the manner required by law, was not so sold and removed in fraud of the internal revenue laws and with intent to evade the taxes thereon; and that, if the claimant had not so satisfied the jury of his intent respecting the same, they might infer that his intent in respect of the same was fraudulent, and that his possession of the goods in suit was with the like intent. In regard to the acts relating to the manufacture of the "extra long smoking tobacco" and the returning it for taxation, the Court charged the jury, that, if they found that such acts were done by the claimant for the purpose of selling and removing such tobacco in fraud of the internal revenue laws and with intent to evade the payment of taxes thereon, they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit. Elsewhere the Court charged the jury, in substance, that, if the acts of the claimant between August, 1866, and January, 1868, in respect to the

"extra long smoking tobacco," showed an intent to defraud the Government in regard to the tax upon such tobacco, and if his acts during the same period in regard to what was called the Orinoco tobacco, such acts being contrary to law, showed an intent to defraud the Government, and if his acts in violating the law in regard to the keeping of the statutory books, and the unlawful and irregular character of the inventories and returns he made, showed an intent not to deal honestly with the Government, but to violate the law, the jury had the right to infer that a fraudulent intent existed in regard to the goods on hand in his establishment when it was seized. I perceive no error in these instructions. In criminal cases, the law presumes every unlawful act to have been criminally intended until the contrary appears, and throws on the accused the burden of disproving the intent; and the same presumption arises in civil actions, where the act complained of was unlawful. (1 *Greenleaf on Evidence*, § 34). In *Cook v. Moore* (11 *Cushing*, 213), the question was whether, to prove a wilful concealment of property by the defendant with a fraudulent purpose, contrary to the bankruptcy Act of 1841, it was competent to show an intent, prior to the passage of that Act, to defraud the plaintiff of his debt by a fraudulent concealment and conveyance of property. The Court held that it was. They say: "Whenever the intent of a party forms part of the matter in issue, upon the pleadings, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the party in doing the acts in question. The reason for this rule is obvious. The only mode of showing a present intent is often to be found in proof of a like intent previously entertained."

Particular objection is made to the instruction as to the burden of proof, contained in the first prayer on the part of the Government. The acts recited therein were unlawful acts, contrary to the statute, and, therefore, presumed

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to result in defrauding the Government. The instruction was, that, if the unlawful sales or removals of the tobacco, from August, 1866, to January, 1868, were proved, and the unlawful neglects in respect to the not entering such sales and removals in the books, abstracts and returns were proved, then, as the legal presumption therefrom was that such sales and removals took place in fraud of the internal revenue laws, and with intent to evade the taxes on the tobacco, the burden of proof was on the claimant to satisfy the jury that such sales and removals were not in fraud of such laws and with intent to evade such taxes; and that, in view of such legal presumption, if the claimant had not rebutted it, the jury had a right to infer a fraudulent intent in respect to such sales and removals, and also to infer that the claimant's possession of the goods in suit was with the like intent. In addition to the observations already made, I regard the propriety of this instruction as having been sanctioned by Judge Woodruff, in *United States v. 18 Barrels (8 Blatchf. C. C. R. 475)*, where, only slight evidence having been given, in behalf of the Government, tending to show that the claimant of distilled spirits had not made true and exact entry and return, it was held that this cast the burden on the claimant, to show that he had complied with the statute. In *United States v. Herdt's Brewery (13 Int. Rev. Record, 95)*, it was held by Judge McCandless, that, from a neglect by a brewer to obey the law, an intent to evade its provisions would be presumed, in the absence of any explanation. (See, also, *Clements v. Moore, 6 Wallace, 299*; *The Luminary, 8 Wheaton, 407*; *The Slavers, 2 Wallace, 350, 366, 375.*)

As to the 13th and 14th of the claimant's prayers for instructions, if they are understood as raising the question of the proper construction of the 48th section, that has been passed upon. If they are understood, as it appears from the bill of exceptions the Court understood them at the trial, as involving propositions of fact, as to

the evidence, addressed to the Court, and which were solely questions for the jury, there was no error in declining to charge in accordance with them.

This disposes of all the questions involved in the first four grounds urged as reasons for granting a new trial. It is proper to say, that the point now raised, as to the construction of the 48th section, was not in fact presented to the mind of the Court at the trial, and was not raised at the trial otherwise than as it may seem to be involved in some of the exceptions to the charge, and in some of the exceptions to refusals to charge in accordance with requests on the part of the claimant, and which exceptions present it, if at all, in ambiguous language, capable as well of another interpretation as of an interpretation that they raise this point; and that the point is raised by counsel who took no part in the trial.

The fifth ground urged for a new trial is, that the Court erred "in instructing the jury that it was immaterial to any issue in this case, what was the lawful rate of tax payable on the said 'extra long smoking tobacco,' embraced in seventeen returns made by the claimant, and in not instructing the jury that the lawful rate of tax payable on the said tobacco was fifteen cents per pound." It is contended, for the claimant, that this tobacco was made partly of leaf and partly of stems, all chopped up together, not sweetened, and put up and sold as smoking tobacco, the stems having undergone a secret process of dyeing, to assimilate them in color to the leaf; that, as it was made in part of stems, it was, under the 94th section of the Act of June 30th, 1864, as amended by the 9th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 133), subject to a tax of only fifteen cents per pound; and that the claimant violated no law in returning such tobacco for tax at fifteen cents per pound. If the lawful rate of tax on such tobacco from and including August 1st, 1866, to and including January 1st, 1868, embracing the period

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during which the claimant returned it at fifteen cents per pound, was greater than that rate, it follows that there was not, in the instruction, any error prejudicial to the claimant.

Under the 94th section of the Act of June 30th, 1864, as amended by the 1st section of the Act of March 3d, 1865 (13 *U. S. Stat. at Large*, 477), these were the taxes on manufactured tobacco other than snuff, cigars, and chewing tobacco: "On * * all * * kinds of manufactured tobacco, not herein otherwise provided for, forty cents per pound. On tobacco twisted by hand, or reduced from leaf into a condition to be consumed, without the use of any machine or instrument, and without being pressed, sweetened, or otherwise prepared, thirty cents per pound. * * On smoking tobacco of all kinds, and imitations thereof, not otherwise herein provided for, thirty-five cents per pound. On smoking tobacco made exclusively of stems, and so sold, fifteen cents per pound." Under those provisions, this "extra long smoking tobacco" was subject to a tax of thirty-five cents per pound. The Act made the tax only fifteen cents per pound on smoking tobacco made exclusively of stems, made of the inferior part of the tobacco leaf, and having none of the leaf part in it; while on all other manufactured tobacco it imposed taxes of thirty, thirty-five and forty cents per pound. The same distinction is found in the 94th section of the Act of June 30th, 1864, as originally enacted (13 *U. S. Stat. at Large*, 270), where smoking tobacco made exclusively of stems is taxed fifteen cents per pound, and all other manufactured tobacco has taxes imposed on it of twenty-five and thirty-five cents per pound; and in the 75th section of the Act of July 1st, 1862, as amended by the 1st section of the Act of March 3d, 1863 (12 *U. S. Stat. at Large*, 717), where smoking tobacco prepared with all the stems in, or made exclusively of stems, is taxed five cents per pound, and all other manufactured tobacco fifteen and

twenty cents per pound ; and in the 75th section of the Act of July 1st, 1862, as originally enacted (*Id.* 463), where smoking tobacco made exclusively of stems is taxed two cents per pound, smoking tobacco prepared with all the stems in, five cents per pound, and all other manufactured tobacco, ten, fifteen, and twenty cents per pound.

Such was the course of legislation on this subject. The 9th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 133), further amended the 94th section of the Act of June 30th, 1864, by providing that, on and after the 1st of August, 1866, the following should be the taxes on manufactured tobacco : "On snuff, manufactured of tobacco, or any substitute for tobacco, * * forty cents per pound. On * * all * * kinds of manufactured tobacco, not herein otherwise provided for, * * forty cents per pound. On tobacco twisted by hand, or reduced from leaf into a condition to be consumed without the use of any machine or instrument, and without being pressed, sweetened or otherwise prepared, and on fine cut shorts, * * thirty cents per pound. On fine cut chewing tobacco, whether manufactured with the stems in or not, or however sold, * * forty cents per pound. On smoking tobacco, sweetened, stemmed or butted, * * forty cents per pound. On smoking tobacco, of all kinds, not sweetened, nor stemmed, nor butted, including that made of stems, or in part of stems, and imitations thereof, * * fifteen cents per pound." In these provisions, there is the same indication of an intention to tax at a low rate tobacco either made wholly of stems, or having in it all its natural stems, and to tax all other tobacco at a higher rate, the former being taxed at fifteen cents per pound, and all other manufactured tobacco being taxed at thirty and forty cents per pound.

This "extra long smoking tobacco," being manufactured tobacco, was, if not otherwise provided for in the

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Act, taxable at forty cents a pound. So, also, if it was smoking tobacco stemmed or butted, it was taxable at forty cents a pound. It is insisted by the claimant, that, having some stems in it, and not being sweetened, it was taxable at fifteen cents a pound, on and after August 1st, 1866. The bill of exceptions shows that the mode of making this "extra long smoking tobacco" was, to take the entire tobacco leaf, and remove from it from one-half to three-fourths in length of the woody central stem that runs through the leaf from end to end, so as to leave in the leaf at its top not enough stem to be noticeable in the product after cutting, and then to cut up together the residuary leaf with stems previously soaked in a certain dye stuff without being sweetened. Prior to August 20th, 1866, for several years, the proportion of such residuary leaf to such dyed stem was seven pounds of the former to two pounds of the latter, and, after that date, the proportion of such residuary leaf to such dyed stem was two pounds of the former to one pound of the latter. It having been ascertained, by experiment, that the average proportion, by weight, of the butts or portions of stem extracted from the leaf, in making this tobacco, was one-fourth of the weight of the entire leaf, it was intended, in making this tobacco, after August 20th, 1866, to cut up, with a given weight of the residuary leaf, at least as much dyed stems as would equal in weight the average quantity of stems taken out of the leaf. When ready for sale, the stem was not distinguishable from the leaf. In the understanding of tobacco manufacturers, leaf tobacco is "stemmed" when the whole of the central stem has been removed from the leaf; and it is "butted," when the thick end or lower portion of the stem is drawn out of the leaf, leaving more or less of the upper part of the stem still in the leaf. It was not practicable, in the process actually employed by the claimant, to restore or replace the identical portions of stem extracted from the leaf. All

of such tobacco returned by the claimant for August, 1866, after the 20th, and for the sixteen succeeding months, was returned by him as liable to a tax of fifteen cents per pound, under the Act of July 13th, 1866, and was classified, in the returns, as "smoking tobacco, not sweetened, stemmed or butted, including that made of stems," and he paid taxes on it at that rate only.

The contention, on the part of the claimant, is, that the statute says that smoking tobacco made in part of stems, that is, smoking tobacco having in it some stems, and not sweetened, shall pay a tax of only fifteen cents per pound; that this tobacco had some stems in it, and, therefore, was made in part of stems, and was not sweetened; and that, consequently, it was liable to a tax of only fifteen cents per pound. It is urged, for the claimant, that it is immaterial, under the statute, whether the identical stems were put back with the residuary leaf, or whether an equal quantity of stems was put back with it, or whether the same proportion was maintained, in the ultimate product, between stem and leaf, that existed in the tobacco as grown; and that, as long as the tobacco is not sweetened, and is smoking tobacco, and is made wholly of stems, or partly of stems and partly of leaf, it is within the fifteen cents a pound clause.

An analysis of the provisions of the statute will aid in ascertaining its meaning. The words "on smoking tobacco, sweetened, stemmed or butted, a tax of forty cents per pound," mean, "on smoking tobacco manufactured from leaf tobacco which has been sweetened, or stemmed, or butted, a tax of forty cents per pound." The words, "on smoking tobacco, of all kinds, not sweetened, nor stemmed, nor butted, * * a tax of fifteen cents per pound," mean, "on smoking tobacco manufactured from leaf tobacco which has not been sweetened, and has not been stemmed, and has not been butted, * * a tax of fifteen cents per pound." This last clause embraces, also, smoking tobacco "made

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of stems, or in part of stems, and imitations thereof." This "extra long smoking tobacco" was made from leaf tobacco which had been butted, stems separately prepared being afterwards added to the residuary leaf. As smoking tobacco manufactured from butted leaves it was within the forty cents a pound clause. If it had had no separate stems added to the residuary leaf, but had been made solely of the residuary leaf left after butting, it would have had in it at least one quarter in length of the central stem left in the leaf after butting, and thus would have been made "in part of stems," and so been subject to the fifteen cents a pound clause, under the reading of that clause contended for by the claimant, although, being smoking tobacco merely butted, it would clearly have been within the forty cents a pound clause. A construction of the fifteen cents a pound clause, which would put such butted tobacco within that clause, when it is manifest the intention was that it should be solely in the forty cents a pound clause, cannot be admitted, if both clauses are capable of such a construction as will not allow any one article to fall within both of them. I think that the forty cents a pound clause as to smoking tobacco manifestly includes all smoking tobacco in which sweetened leaf is a constituent, and all in which stemmed leaf is a constituent, and all in which butted leaf is a constituent. In direct contradistinction to this, the fifteen cents a pound clause says that smoking tobacco made of tobacco leaves in their natural state as to stem and leaf, and not at all sweetened, and in which stemmed leaf is not a constituent, and in which butted leaf is not a constituent, shall pay only fifteen cents a pound tax. It will not do to go outside of the plain language of the statute to open wide a door to fraud, by saying that you may butt the leaves, and then restore other butts equal in quantity to the removed butts, and call the product tobacco not butted; or stem the leaves, and then restore other

stems equal in quantity to the removed stems, and call the product tobacco not stemmed. The stem is the least valuable part of the tobacco. It is allowed to be cut up in and with and as a part of the leaf as it grew, as smoking tobacco, at the low rate of tax. If it is so cut up, there is sure to be in the product a certain average quantity of stem. If the stem or butt is allowed to be removed, what is left becomes at once more valuable than the whole was, and liable to the forty cents a pound tax; and it cannot for a moment be supposed that Congress intended that the putting back a part of the removed stem or butt should reduce the tobacco to the fifteen cents a pound clause, while the manufacturer would be able to impose on the public by selling the product as one of a quality taxable at forty cents a pound.

In view of these considerations, and in harmony with them, an interpretation can be given to the words, "including that made of stems, or in part of stems, and imitations thereof," entirely consistent with the language, and not open to the objection of including within the fifteen cents a pound clause smoking tobacco already clearly put into the forty cents a pound clause. The stems being the least valuable part, Congress first provided, in the fifteen cents a pound clause, that smoking tobacco made by cutting up the natural leaf, and, therefore, including all the stem which grew in the leaf, should pay only fifteen cents a pound. It then passed to an inferior grade of smoking tobacco, by providing that smoking tobacco made wholly of stems, without any admixture of leaf, should pay only fifteen cents a pound. It then passed to a still lower grade, by providing that smoking tobacco made, as to part of it, of tobacco stems, and, as to the rest of it, of imitations of tobacco stems, should pay only fifteen cents per pound. If the words "in part of stems" are to be so construed, as contended by the claimant, as to put into the fifteen cents a pound

clause smoking tobacco having but a small quantity of stem in it, and the rest nearly all pure leaf, making a product nearly equal, perhaps, in quality, to stemmed leaf paying forty cents a pound, we not only have Congress opening the way to the Government's being defrauded readily of twenty-five cents a pound on large quantities of smoking tobacco, but we have it making an enactment which allows, as said before, smoking tobacco made of butted leaf and having in it some stems to be within both the forty cents a pound clause and the fifteen cents a pound clause. The words "in part of stems, and imitations thereof," would naturally indicate a lower grade of tobacco than that "made of stems," whereas, on the interpretation contended for by the claimant, a grade of tobacco nearly up to pure stemmed leaf may be included in the words "in part of stems." The words "in part of stems, and imitations thereof," have no other meaning than if they read "of stems in part and imitations thereof," that is, of stems partly, and, as to the rest of the constituents, of imitations of stems; and no other meaning than if they read "in part of stems, and in part of imitations thereof." The words are not happily chosen, but it is not possible, in my judgment, to give them a meaning which would allow this "extra long smoking tobacco" to have been subject to any other tax than that of forty cents a pound.

Not only is this construction in harmony with the prior legislation of Congress in regard to manufactured tobacco, but subsequent legislation confirms these views. The 61st section of the Act of July 20th, 1868 (15 *U. S. Stat. at Large*, 153), imposes a tax of sixteen cents per pound "on all smoking tobacco exclusively of stems, or of leaf with all the stems in, and so sold, the leaf not having been previously stripped, butted, or rolled, and from which no part of the stems have been separated by sifting, stripping, dressing, or in any other manner, either before, during, or after the process of manufac-

turing, on all fine cut shorts, the refuse of fine cut chewing tobacco which has passed through a riddle of thirty-six meshes to the square inch, by process of sifting, and on all refuse scraps and sweepings of tobacco ;" and on all other manufactured tobacco and snuff a tax of thirty-two cents per pound.

The Court charged the jury, that it was not necessary to determine what was the proper interpretation of the fifteen cents clause in the Act of 1866, or under what head in that Act the "extra long smoking tobacco" fell. It also charged the jury, in accordance with the first proposition on the part of the claimant, that, if they should believe that the returns for taxation, of the "extra long smoking tobacco," between August, 1866, and the date of seizure were made in good faith and with an honest belief, on the part of the claimant and his agents concerned in the preparation of said returns, that said tobacco was liable to the fifteen cents rate of duty, and to no other or higher rate, then, even though said tobacco was, by law, liable to the forty cents rate of duty, the jury could not, for that cause, find a verdict for the Government, under section 48. But the Court refused to charge, as requested by the claimant, that the "extra long smoking tobacco," if composed of both stem and leaf, or if made in part of stems, or if it contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, was liable to a tax of only fifteen cents per pound. Although it may have been erroneous to charge the jury, as was done in substance, that it was immaterial to any issue in this case what was the lawful rate of tax on the "extra long smoking tobacco," yet, as such lawful rate was, in fact, forty cents a pound, the error, if any, was prejudicial only to the Government, and not to the claimant, and it was not erroneous to not instruct the jury that the lawful rate of tax payable on such tobacco was fifteen cents per pound.

The sixth ground urged for a new trial is, that the Court erred "in instructing the jury that it was illegal for the claimant to return for tax the Orinoco tobacco in the bill of exceptions mentioned, under the circumstances therein mentioned," and "in instructing the jury that they could infer from the transactions in the bill of exceptions described an intent to defraud the revenue thereby." The facts in regard to this Orinoco tobacco, as set out in the bill of exceptions, are these: From a period prior to March, 1865, and down to April and May, 1867, the claimant had in his factory, stored in its lofts, 7,000 pounds of smoking tobacco, called "pressed Orinoco tobacco," manufactured by him, being leaves having all the stems in, and the leaves not having been sweetened or butted or stripped from the stems. In his monthly return for March, 1865, of sales and removals of manufactured tobacco during that month, he returned said 7,000 pounds as sold during that month, and subject to a tax of twenty-five cents per pound, under the Act of June 30th, 1864, and paid tax on it at that rate. In his book of sales, under date of March 8th, 1865, appeared an entry of a sale of \$60,000 worth of manufactured tobacco (including the said 7,000 pounds) to Kearney & Waterman, a commission paper house. A bill of the goods was made out to Kearney & Waterman, but the goods were never delivered to them, and were not removed from the factory. The claimant himself testified, that the goods were never intended to be delivered to Kearney & Waterman; that it was understood between him and Kearney & Waterman that the goods were sold and bought back; that this proceeding was for the purpose of returning the said goods as sold, in his monthly return for taxation for March, 1865, in order to avoid the payment of an increased rate of taxation to which said goods would be liable under the Act of March 3d, 1865, which was to take effect April 1st, 1865; that, prior to said transaction with Kearney & Waterman, he con-

sulted with some members of the Senate Committee on Finance, and with several members of the House Committee of Ways and Means, as to whether, in respect of goods on hand when the said Act of March 3d, 1865, should go into effect, he would have a right to return the same for taxation under the Act of June 30th, 1864, and was advised by them that he would have such right; and that he had no purpose to defraud the Government, but considered that such a transaction warranted him in returning the goods as sold. The 7,000 pounds of Orinoco tobacco remained in the claimant's factory until April and May, 1867, when he sent it to California for sale. When it was so removed for sale he did not return it for taxation, and he did not keep any account, in the statutory book, of such removal for sale of such tobacco. If it had been then returned, it would have been liable to a tax of only fifteen cents a pound. Under the 94th section of the Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 270), it was liable to a tax of twenty-five cents per pound, as "smoking tobacco, manufactured with all the stem in, the leaf not having been butted or stripped from the stem." By the amendment made by the 1st section of the Act of March 3d, 1865 (*Id.* 477), to the 94th section of the Act of 1864, which amendment was to take effect on and after the 1st of April 1865, it would have been liable to a tax of thirty-five cents per pound, as being smoking tobacco not made exclusively of stems. This rate of tax on it continued until August 1st, 1866, after which date, by the amendment made to the 94th section of the Act of 1864, by the 9th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 133), the tax on it was fifteen cents per pound, as smoking tobacco, not sweetened, nor stemmed, nor butted; and that was the rate of tax on it in April and May, 1867, when it was removed to California for sale.

On this state of facts the Court charged the jury, that this transaction of the claimant's was illegal; that it

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was illegal to return the tobacco for taxation in March, 1865, because it had not been sold or removed for consumption; that, under the 94th section of the Act of 1864, under which the tobacco was returned for taxation in March, 1865, the tax of twenty-five cents a pound was leviable, collectable, and payable on the tobacco only when it was sold, or consumed or used by its manufacturer, or removed for consumption or for delivery to others than agents of the manufacturer within the United States or territories thereof; that there was no real sale of the tobacco in March, 1865; and that a removal for consumption, as defined in the 91st section of the Act of 1864 (13 *U. S. Stat. at Large*, 263), required that there should be a removal of the tobacco from the premises of the manufacturer, in good faith, with a then present intention to have it consumed, as against the will of the manufacturer and owner of it. On the trial it was contended, for the claimant, that, as he had returned this tobacco in March, 1865, and paid a tax on it of twenty-five cents a pound, he was under no obligation to make a return of it afterwards and pay another tax upon it, especially if, at the time it was afterwards sold or removed for consumption, the tax on it was fifteen cents a pound; and that it was lawful for the claimant to return this tobacco for taxation in March, 1865, and pay a tax on it then. In support of these views, the 70th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 173), was referred to, which was in force when this tobacco was removed from the claimant's factory in April and May, 1867. That section provides, that "all manufactures and productions on which a duty was imposed by either of the Acts repealed by this Act" (which includes the provisions of the Act of June 30th, 1864, imposing duties on tobacco, and which were the provisions in force in March, 1865, when this tobacco was returned for taxation, and also includes the provisions of the 9th section of that Act, as amended by

the Act of March 3d, 1865, and which latter provisions were in force, taxing tobacco, from April 1st, 1865, to August 1st, 1866), "which shall be in the possession of the manufacturer or producer, or of his agent or agents, on the day when this Act takes effect," August 1st, 1866, "the duty imposed by any such former Act not having been paid, shall be held and deemed to have been manufactured and produced after such date." The effect of this provision, in respect to this tobacco, was contended by the claimant to be, that, although this tobacco was in his possession, as its manufacturer, on the 1st of August, 1866, yet it could not be deemed to have been manufactured on or after August 1st, 1866, because the duty imposed on it by the Act of June 30th, 1864, had been paid in March, 1865. But the Court charged the jury, that, as no tax was leviable, collectable or payable on this tobacco, under the Act of 1864, until it was sold or removed for consumption, the case was not one where a duty imposed by that Act had been paid, within the meaning of the provision of the 70th section of the Act of 1866; that the claimant had no right to return this tobacco for taxation at twenty-five cents a pound, especially when he acknowledged that he did so to get rid of the coming thirty-five cents a pound tax, and when he had an intent to commit a fraud on the Government; and that the policy of the law was manifest, not to permit tax-paid goods, unsold, to be kept in masses on the premises of their manufacturer. In reference to this Orinoco tobacco, the Court further charged the jury, as requested by the claimant, that, even if they should find that a fraudulent intent existed in the mind of the claimant at the time of making the return of such tobacco in March, 1865, that fact of itself would not justify them in finding the existence of a fraudulent intention on his part in respect to the property proceeded against, at the time that property was found or seized; that, if they should find that a fraudulent

act was committed by the claimant in 1865, in respect to property then in his possession, that alone, unless supported by other evidence, was not sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property found in his possession in 1868, and would not warrant a verdict of condemnation; that, if he paid the twenty-five cents a pound tax on this tobacco in 1865, he became liable to pay no additional tax on it by reason of its shipment to California in 1867; that if, when he shipped it to California, he believed that all the tax due on it to the Government had been paid, his failure to return it for taxation on such shipment was no evidence of fraudulent intent on his part; and that, if in March, 1865, when he paid the tax, he believed that such tax was due, he could have had no fraudulent intent, but it must have been the payment of a tax which he honestly believed at the time he had a right to pay, and not the payment of a tax merely because it was going to be raised the next day to thirty-five cents a pound.

It is contended, on the part of the claimant, that it was not unlawful for him to return this Orinoco tobacco for taxation in March, 1865, and pay upon it at that time a tax of twenty-five cents a pound; that the fact of the so-called sale to Kearney & Waterman is an immaterial and irrelevant fact; that the motive which governed the claimant in paying the tax before the 1st of April, 1865, instead of waiting until a future day, is immaterial; that he had a lawful right to pay it, even though he did so for the purpose of avoiding the higher duty that was to go into effect on the 1st of April, 1865; that any person holding property on which a tax will become due on the doing of some act by him, such as a sale or a removal of such property, may himself dispense with the doing of that act, and tender and pay the tax to the Government; that the paying of the tax to the Government is waiver of the necessity of doing the act on the

doing of which the tax would properly accrue; that the act of sale or removal, considered as a prerequisite to the accruing of the tax, is an act not in the interest of the Government, but an act in the interest of the tax-payer, and prescribed for his convenience, and, therefore, an act which he may disclaim or waive the doing of, by anticipating the payment of the tax; that no harm can result to the Government from an accumulation of tax-paid manufactured articles in the hands of their manufacturer; and that what the claimant did in regard to this Orinoco tobacco has no tendency to show that he intended to commit a fraud on the Government.

The proposition advanced on the part of the claimant is, that, although the statute provides that a certain tax shall become payable on manufactured tobacco when it shall be sold or removed, and the Government cannot enforce the payment of such tax by the manufacturer until the tobacco shall be actually sold or removed, the manufacturer may lawfully pay the tax on it, as sold or removed, although it is not sold or removed. Of course, if he may do so at all, he may do so in view of the coming into operation of a higher tax on the article, and thus secure an advantage over other manufacturers, in respect of tobacco in fact sold or removed after the coming into operation of the higher tax. In this case, the claimant made a false representation to the Government. He returned the tobacco as sold when it was not sold. The return was sworn to as true when it was not true; the tax was received on the faith of the representation that the tobacco had been sold; the tax could not accrue until the tobacco had been sold or removed; an increased tax of ten cents a pound was to go into effect the next day; and it is seriously contended that this was a lawful and honest transaction, that the claimant was only waiving and dispensing with a restriction that was for his benefit and convenience, that, if he chose to pay the tax without selling or removing the tobacco, the

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Government has no cause of complaint, and that there was nothing in the transaction showing an intent to defraud the Government. No principle that has ever been applied to the interpretation of a revenue statute sanctions this doctrine. There is a mutuality in the provisions for taxation. The Government can enforce the tax only under certain circumstances. The non-payment of it is unlawful only when those circumstances exist. *E converso*, the payment of it is lawful only when those circumstances exist. Otherwise, the claimant would have had a right to compel the officers of the Government to receive the tax although the tobacco had not been sold or removed. He did not, however, claim any such right at the time. He falsely represented that the tax had in fact accrued because the tobacco had been sold. He paid the money on that false pretence. There was no power in the collector to receive the tax, except as a tax on tobacco sold. If the tobacco had been sold afterwards, at a time when the tax on it was thirty-five cents a pound, the Government could not have been prevented from collecting the additional ten cents a pound tax on it, by the fact that the twenty-five cents a pound had been received on it by the collector, on the false representation that it had been sold before that amount had been paid on it.

The course pursued by the claimant in regard to this Orinoco tobacco was not warranted by any statute in force at the time of the transactions of March, 1865. The 70th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 173), was enacted long afterwards. This Orinoco tobacco was in the possession of the claimant on the 1st of August, 1866, when that Act took effect, but the duty imposed on it by former Acts had not been paid, within the meaning of such 70th section. It was, therefore, to be deemed to have been manufactured on or after August 1st, 1866. In the special sense in which the word "imposed" is used in the 70th section, in

connection with the words "not having been paid," the tax may properly be said not to have been "imposed" in such special sense, by the 1st of August, 1866. The provision means, that, where the tax, declared by the former Act to be collectable, has been paid when enforceable and payable, the taxable articles in the hands of a manufacturer on the 1st of August, 1866, on which such tax has so been paid, shall not be deemed to have been manufactured on or after the 1st of August, 1866; but, otherwise, they shall. In this sense, the word "imposed" may properly be regarded as having a different meaning, in the phrase, "the duty imposed by any such former Act not having been paid," from that which it has in the 48th section of the Act of June 30th, 1864, where it is used merely in the phrase, "imposed by the provisions of law," without any reference to the payment of the tax or to the time when it becomes payable. The succeeding provision in the 70th section of the Act of 1866, to the effect, that "whenever, by the terms of this Act, a duty is imposed upon any articles, goods, wares, or merchandise, manufactured or produced, upon which no duty was imposed by either of said former Acts, it shall apply to such as were manufactured or produced, and not removed from the place of manufacture or production, on the day when this Act takes effect," shows the intention of Congress in respect to the whole subject. It was, that where manufactured articles were taxable by former laws, and the taxes had accrued and been paid on them, they should not be taxable under the new law; that where they were not taxable by former laws, they should, if taxable by the new law, be so taxable, although manufactured before the new law went into effect, provided they were not removed from the place of their manufacture at the time the new law went into effect; that where accrued taxes had been paid on manufactured articles taxable by the former laws, such articles should not be regarded

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as manufactured under the new law ; and that where manufactured articles not taxable by the former laws had been removed from the place of their manufacture, they should not be regarded as manufactured under the new law.

I see, therefore, no error in the instruction to the jury that it was illegal for the claimant to return the Orinoco tobacco for tax, in March, 1865, under the circumstances set forth in the bill of exceptions, and no error in instructing them that they could infer from the transactions in respect to such tobacco an intent to defraud the revenue thereby, especially in view of the fact, that the Court, in compliance with the fourth prayer of the claimant, instructed the jury that the existence of a fraudulent intent in the mind of the claimant, at the time of making return of this tobacco, in March, 1865, would not of itself justify them in finding the existence of a fraudulent intent on his part in respect to the property in suit, and that the Court, in compliance with the fifth prayer of the claimant, instructed the jury that the commission of a fraudulent act by the claimant in 1865, in respect to property then in his possession, was not, alone, unless supported by other evidence, sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property in suit, and that the Court, in compliance with the third prayer of the claimant, instructed the jury that fraudulent intent and fraudulent acts long prior to the time of the seizure of the property in suit, would not warrant a verdict of condemnation, unless supported by evidence of fraudulent intent or fraudulent acts at a period nearly coincident with the time of seizure, and that, if, for the ten months next prior to the seizure, the claimant properly made returns and paid taxes upon his manufactures, the jury might fairly infer therefrom a discontinuance of any fraudulent intent which he might have had previously.

The seventh ground advanced for a new trial is, that the Court erred "in instructing the jury that, because the claimant did not keep in book form a separate account of the tobacco manufactured by him in 1867 and 1868, he committed a violation of law from which the jury could infer an intent to sell the manufactured tobacco seized in this case without paying the taxes that might be due thereon, &c." It is admitted, by the claimant, that the 90th section of the Act of June 30th, 1864, as amended by the 9th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 124), provides, that every tobacco manufacturer shall keep in book form an accurate account of the quantity of tobacco he manufactures, and shall return a sworn inventory every year of the quantity of tobacco held or owned by him on the 1st day of January in such year, setting forth the various kinds of articles manufactured by him separately from those purchased by him, and shall return monthly a sworn abstract of his purchases, sales and removals. The section goes on to provide, that, in case of refusal or neglect to return the inventory, or the abstract, or to keep the account, the manufacturer shall forfeit \$500, to be recovered, with costs of suit. It is contended, that, because this penalty is imposed for a neglect to keep the account in book form of manufactured tobacco, therefore, the fact of such neglect cannot be resorted to as collateral evidence from which to infer an intent to defraud, within the 48th section, in respect to the property in suit; and that, because the neglect to keep such an account is not an offence of the same class or character with the offence sought to be established under the 48th section, it cannot be resorted to as collateral evidence, in regard to an intent respecting the property in suit. The Court charged, that the claimant violated the law in not keeping an account of goods manufactured by him, and that the keeping of such account was necessary in order to enable him truly to make up the annual

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inventory required to be returned. This neglect in keeping the account, in connection with certain alleged discrepancies between the inventories for 1867 and 1868 and the monthly returns, and with the transactions in regard to the Orinoco tobacco, and with the accumulation in the hands of the claimant of a large quantity of tax-paid tobacco manufactured by him, which had never been sold or removed, were submitted to the jury as circumstances which, if proved, warranted the inference of an intent throughout, on the part of the claimant, not to deal honestly with the Government, but to violate the law, and also the further inference that he had a fraudulent intent in regard to the goods in suit. Under the rule before stated in regard to what is proper evidence on the question of intent, I see no error in these instructions. All the unlawful acts and omissions of the claimant as a manufacturer of tobacco, in the discharge of his duties as such towards the Government under the internal revenue laws, were proper evidence to be taken into consideration by the jury, and if they believed, from the evidence, that, by such acts and omissions, he intended to defraud the Government, they had a right to infer a like intent in regard to the property in suit. The instructions throughout proceeded upon the express statement to the jury that unlawful acts and omissions were nothing, unless the jury believed that there was in them an intent to defraud.

The fact of the imposition of a penalty for the mere neglect to keep the account, without any intent to defraud, cannot have the effect to remove from consideration the intent in a neglect, if such intent was one to defraud; and an intent to defraud in neglecting to keep an account of goods manufactured, is an intent of no different quality, class or character from an intent to defraud in selling or removing manufactured goods without paying the taxes on them.

The eighth ground for a new trial is, that the Court

erred "in instructing the jury that it was illegal for the claimant to return for tax the goods removed from his manufactory to his retail department, before such goods had been actually sold." The instruction was, that it was unlawful for the claimant to return for tax, on a certain day, a quantity of tobacco manufactured by him and not sold or removed from his premises, and then take it into his retail department on the same premises, and sell it by retail there over his retail counter, without keeping any record of such sales, and without returning any abstract of such sales. It was shown that the claimant had done this. This instruction involves the same question before considered in regard to the right of the claimant to pay taxes at his pleasure on masses of tobacco manufactured by him and not sold or removed; and the further question of his right to sell tobacco manufactured by him, and not before sold or removed, and to omit any record or return of it as sold when it was in fact sold, because he had previously falsely returned it as sold or removed. In this connection, the Court instructed the jury that, if they should believe that the mode of returning for taxation the goods sold over the retail counter, by returning them at the time they were transferred to such retail counter, was adopted for the convenience of the claimant, and used without any fraudulent intent, in the business of the claimant, as a manufacturer, such fact furnished no evidence in support of a verdict of condemnation in this case; that the mere fact that what the claimant did was unlawful amounted to nothing; that if, it being so unlawful, the jury believed there was a fraudulent intent in it, it was to be taken into consideration; and that, if the jury believed there was no fraudulent intent in it, it was not to be taken into consideration. It appears, by the bill of exceptions, that the Government gave evidence tending to prove that, during the period from August 1st, 1866, to January 1st, 1868, large quantities of manufactured tobacco were sold and removed

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from his factory by the claimant, without due return thereof for taxation and payment of the taxes thereon, as required by law. In view of this fact, and of the neglect of the claimant to keep or return any account of the sales of the goods so removed to his retail department, as sales therein, and of the untruth of his returns, returning, as sold or removed, goods which were not sold and were not removed from his premises, or, in the sense of the law, from the place, street or number where his manufacturing of them was carried on, and of the opportunities for fraud afforded by the course adopted by him, it was for the jury to say what was the intent of the claimant in adopting such course, as bearing on his intent in reference to the goods in suit.

I have reviewed this case at great length because of the large amount of property involved in it, its importance to the parties, and the earnestness with which the grounds urged for a new trial were pressed upon me by the learned counsel for the claimant. But I am unable to see that any error was committed in any of the particulars urged, and, therefore, the motion must be denied.

Thomas Simons (Assistant District Attorney), for the United States.

George T. Curtis, for the claimant.

Eastern District of New York.

MAY, 1872.

THE STEAMBOAT SUNSWICK.

STEAMBOAT ACT.—INSPECTION OF BOILER.—INTER-STATE COMMERCE.—
FERRY-BOAT ON EAST RIVER.—BURDEN OF PROOF.—JUDICIAL
NOTICE.

A libel was filed against a ferry-boat engaged in carrying passengers and freight across the East river, from Astoria to New York city, to recover a penalty of \$500 for a failure to have her boiler inspected, as required by the 11th section of the steamboat Act of February 28th, 1871 (16 *U. S. Stat. at Large*, 440):

Held, That the Court would take judicial notice that Astoria was on Long Island, whose inhabitants have commercial relations with other States of the Union, and that it is by means of the ferry-boats that such commerce is carried on;

That proof that the ferry-boat did carry the ordinary load of passengers and freight, and was held out as ready to transport on such a thoroughfare all passengers and freight that might offer, was sufficient to throw upon the claimants the burden of proving that such passengers and freight were not destined for other States;

That, in the absence of such proof, the ferry-boat must be held to be within the provisions of the steamboat Act.

BENEDICT, J. This is a proceeding *in rem*, in behalf of the United States, against the steamboat Sunswick, to enforce against that vessel a liability for \$500, under the provisions of the Act of Congress entitled "An Act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," passed February 28th, 1871 (16 *U. S. Stat. at Large*, 440).

The charge is that the boat was engaged in navigating public navigable waters of the United States, to wit, the harbor and bay of New York, without having her boiler inspected, as required by the 11th section of the statute above referred to.

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The defence is that the boat is not shown to be subject to be inspected under the laws of the United States, but was engaged in the purely internal commerce of the State of New York.

That the vessel had failed to comply with the section of the statute referred to is conceded, and it cannot be disputed that she is a vessel, within the description given by the Act, of vessels to which the law is declared to be applicable.

By the express words of the 58th section of the Act, its provisions are made applicable to every ferry-boat; and, by section 41, all steamers "navigating the lakes, bays, inlets, sounds, rivers, harbors or other navigable waters of the United States, where such waters are common highways of commerce, or open to general or competitive navigation," are made subject to the provisions of the Act; and, in my opinion, she must, upon the evidence, be held subject to the Act, although, notwithstanding its broad language, it be considered inoperative as against a vessel exclusively engaged in purely internal commerce.

The evidence shows that, at the time complained of, the Sunswick was a steam ferry-boat used as one of the ferry-boats employed to operate the Astoria ferry, and ran between Astoria, a place on Long Island, to the foot of 92d street, a place on New York Island, carrying passengers and freight. It also appears in evidence that the Astoria ferry is a public ferry, established by law, and a common thoroughfare open to all, and used for the transporting of all passengers and freight which cross the East river at that point. Judicial notice may be taken of the fact that Astoria is on an island, which contains a large population and has numerous and extensive manufactories and large cities within its bounds; that its inhabitants have commercial relations with various States of the Union, and use the ferry-boats as the ordinary means of communication between the island and the

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mainland; that, upon these boats, large quantities of merchandise and numerous passengers, destined to places in different States, are necessarily transported in the ordinary course of daily business, and that it is principally by means of these ferries that the commerce between Long Island and other States is carried on.

The East river is an arm of the sea, and navigable water of the United States; and, by the decision of the Supreme Court in the case of the *Daniel Ball* (10 *Wal.* 557), a vessel employed in transporting on such waters goods destined for other States is engaged in commerce among the States, and, however limited that commerce may be, she is, so far as it goes, subject to the legislation of Congress, although her route may lie wholly within a single State, and she does not run in connection with or in continuation of any line of steamers or any line of railway.

The ferry-boats on the East river come within the scope of this decision, and, consequently, must be subject to the provisions of the Act of February 28th, 1871.

The only doubt in this particular action arises from the absence of any evidence showing a transporting on this ferry-boat, at any particular time, of either merchandise, which had begun to move as an article of trade from one State to another, or of passengers having a similar destination. But my conclusion is that proof that the vessel was one of the ferry-boats, engaged on such a ferry as above described, and that while so engaged she did actually transport the ordinary load of passengers and freight which compose the cargoes of those ferry-boats, and was held out as ready to transport, on such a thoroughfare, all passengers and freight that might offer, is sufficient to shift the burden of proof, and in the absence of any evidence from the claimants of the vessel, will warrant the inference that the vessel was being used as an instrument of inter-state commerce, as defined by the Supreme Court in the case of the *Daniel Ball*. She was,

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therefore, subject to the laws of Congress, and must be held liable for the omission of the proper inspection required by the 11th section of the Act of February 28th, 1871.

For the United States, *J. J. Allen* (*Assistant District Attorney*).

For claimants, *Beebe, Donohue & Cooke*.

MAY, 1872.

THE STEAMBOAT VERMONT.

WHARFAGE.—NAVIGATING THE CANALS.

The Act of the State of New York of May 6th, 1870 (*Session Laws of 1870, p. 1696*), fixed certain new rates of wharfage, "except that all canal-boats engaged in navigating the canals in this State, and vessels known as North river barges, shall pay the same rates as heretofore."

A vessel propelled by steam power, for the sole purpose of towing boats on the canals, while in the process of construction, occupied a wharf in the port of New York:

Held, That she was a canal-boat within the meaning of the exception above stated, but was not engaged in navigating the canals, and was, therefore, liable to pay wharfage at the rate prescribed by the Act of 1870.

BENEDICT, J. This is an action by a wharfinger to recover wharfage of the steamboat Vermont.

The only question which it presents for my determination is whether the vessel proceeded against is to be charged wharfage as a canal-boat navigating the canals in this State.

The statute of the State of New York, passed May

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6th, 1870, fixes certain rates of wharfage which may be lawfully charged within the cities of New York and Brooklyn, but contains an exception in the following words: "except that all canal-boats navigating the canals in this State, and vessels known as North river barges, shall pay the same rates as heretofore."

The Vermont was a boat propelled by steam power, and constructed for the sole purpose of towing boats on canals, and was not adapted to any other navigation. She presented some peculiar features, having been constructed as an experiment, and being an effort to devise a method for using steam power on canals, and was not a vessel of the description ordinarily known as canal-boats. Nevertheless, I consider her to be a canal-boat within the meaning of the exception in the statute in question, which was intended as a protection to all craft while navigating the canals of this State.

If, therefore, it had appeared that at the time she used the libellants' wharf the Vermont was engaged in navigating the canals of this State as her occupation, I should hold her to be within the exception, and only liable to the former rates of wharfage.

But the difficulty here is that the evidence shows that when the Vermont used the libellants' wharf she was in process of construction, and up to the time of leaving this wharf was not completed.

She was intended for navigating the canals of this State, but, as yet, was unfinished, and while so unfinished, and for that reason unfit for any navigation whatever, she could not be considered to be engaged in the canal navigation of this State.

No fact could be referred to as proof of such or any occupation. She was an uncompleted vessel, as yet not engaged in navigating at all. She is not, therefore, covered by the exception, which is expressly confined to vessels engaged in navigating the canals of this State,

The Brig Minnie Miller, her Freight and Cargo.

and must pay the rates paid by all vessels not so employed.

Let a decree be entered for the amount claimed and costs.

Barney, Butler & Parsons, for libellants.

Moses Ely, for claimants.

MAY, 1872.

THE BRIG MINNIE MILLER, HER FREIGHT
AND CARGO.

SALVAGE.—DETENTION OF PROPERTY BY SALVORS.—COSTS.

The ship P. fell in with the brig M. about 175 miles from New York. The brig had lost her masts, but had rigged jury masts, and was making progress towards New York, her destination. The P. took her in tow and towed her till near Sandy Hook, when a tug took her to New York, where she arrived five days after she was taken in tow. Part of her chain having been left on board of the P., was demanded of her, but the master of the P. refused to give it up, saying they should hold it till the salvage was settled. The value of the brig, freight and cargo, was \$18,500:

Held, That the service was not towage merely, but salvage; that \$2,250 was a proper amount to be awarded, and that the libellants should not recover costs because of the refusal to deliver up the chain, such costs to be paid by the owners, unless the refusal was shown to have been without the knowledge of the owners, and, in that case, by the master.

THIS was a libel by the owners and the master and crew of the ship Pacific to recover salvage for services rendered to the Minnie Miller. The Pacific fell in with the Minnie Miller about 175 miles from New York, dismasted and in distress. Both vessels were bound to New York. The ship took hold of the brig and towed her nearly to Sandy Hook, the service occupying five days.

The Brig Minnie Miller, her Freight and Cargo.

The brig's answer to the libel denied that the service was a salvage service, stating that, though she had lost her masts, yet jury masts had been rigged, by means of which the brig was prosecuting, and could have prosecuted, her voyage, and was not in distress. It was claimed, on behalf of the brig, that the brig was only bound to pay for towage, which she was willing to pay.

The value of the brig, freight and cargo was \$18,500. It appeared in evidence that a part of the brig's chain, which had been used in towing her, was left on board the Pacific and was brought by her to New York. A demand was made for the chain, but it was not given up, the master of the Pacific saying that they would keep it till the salvage was determined.

For libellants, *James K. Hill*.

For claimants, *W. A. Darling*.

BENEDICT, J. The facts proved in this action disclose a case of salvage service rendered by the ship Pacific to the brig Minnie Miller; and a proper reward to be paid therefor by the brig, her freight and cargo, I judge to be the sum of \$2,250, the same to be borne by the brig, her freight, and the cargo, in proportion to their respective values. I give the libellants no costs because of the circumstances attending the detention of the brig's chain by the ship after a demand made therefor.

Courts of Admiralty are always careful to see that in any case of salvage a proper reward is paid therefor, and they are not only willing but competent to protect salvors in their rights. There is, therefore, seldom, if ever, any excuse for the use of pressure of any kind to secure or even hasten a proper adjustment of the salvor's claim.

In the present instance there was no necessity for retaining possession of the chain, and it should have been promptly returned to the brig, instead of which it was

The Brig Wexford and her Cargo.

detained, with the notice that it would be held till the salvage was settled, and it is still so held.

To mark my disapproval of such action, I refuse costs, and direct that, in apportioning the salvage, the libellants' costs be charged to the owner of the ship, unless it be made to appear that the captain detained the chain without the knowledge of the owner, in which case the master must bear the costs.

MAY, 1872.

THE BRIG WEXFORD AND HER CARGO.

SALVAGE.—INEQUITABLE AGREEMENT.—COSTS.

A brig, dismasted and in distress, was fallen in with at sea, by a pilot boat. The master of the brig had been hurt and was confined to his bed. Her owner was on board. The pilots boarded her and demanded \$5,000, to tow her into port. This was refused, and they came down to \$2,500, threatening to leave the brig if an agreement to pay that sum was not made. The master and owner thereupon agreed to pay them the \$2,500, and the pilot boat took hold of the brig, and after nine days towing, brought her in safety into the port of New York. The brig and her cargo were worth \$3,800.

Held, That, considering the value of the property, the agreement, under the circumstances, was an inequitable one, and would not be enforced;

That \$1,500 was as liberal a reward as could be awarded to the salvors;

That costs would be awarded to them, because the claimants offered no particular sum before suit brought.

BENEDICT, J. The libel is filed in this action, to recover salvage of the brig Wexford and her cargo. The material averments are, that on the 14th day of October, 1871, the pilot boat Isaac Webb, while cruising in about Lat. 41° 11' and Long. 66° W. discovered the brig dismasted and in distress; that at the request of the master, the pilot boat took the brig in tow, and, after nine days'

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towing, brought her in safety into New York ; that the brig was helpless and unmanageable and short of provisions and her crew exhausted ; that the master and owner of the brig, at the time of the request aforesaid, agreed to pay the libellants the sum of \$2,500, for the services they might render in towing the brig to a port of safety ; that said sum was a reasonable sum for the services, but payment of it is now refused. Wherefore, the libellants pray the Court to decree payment of said sum or such sum as the Court shall consider reasonable for the salvage services.

The claimants of the brig and cargo, set up in their answer that at the time the captain agreed to pay \$2,500 to the pilot, he was disabled and unfit to make a contract ; that the pilots, to induce the bargain, refused to afford assistance without such a promise, and threatened to leave the vessel and captain, and that the bargain is unjust and inequitable, and not available to fix the amount of salvage which should be paid. That the claimants have always been willing to pay a fair salvage, but the pilots refuse to accept any less than \$2,500.

Upon these pleadings, and the evidence adduced in support thereof, the first question is, whether the agreement to pay \$2,500, which it is conceded was made by the master and owner of the brig, is to be taken for a guide, in determining the amount of the reward which should be paid to these salvors. Such contracts are not obligatory, unless it be made to appear that the rate is just, and was agreed to without pressure of any sort.

The circumstances under which the agreement was made, therefore, become important. It appears that the brig was dismasted and helpless at sea, some hundreds of miles from any port, but yet in the track of steamers, and tight. Her master had been hurt and was confined to his bed. The pilots boarded the vessel and offered to tow the vessel, if their compensation should be fixed at \$5,000 ; but finally, after some hours of negotiation, came

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down to \$2,500; and they plainly notified the master and the owner, who was on board, that they would leave the wreck, unless an agreement was made to pay them that sum.

In the condition the master was, the suggestions to leave him, in a vessel dismasted and without sails, must have had a forcible effect in bringing him to agree as he did to the amount demanded. The owner declined for some time to agree to pay more than \$1,000; but finally agreed to \$2,500; with a plain intimation, that he considered the sum excessive.

The value of the property, for the towing of which this \$2,500, was to be paid, did not exceed \$4,000.

The vessel was a British vessel, built in 1869, of 267 tons registry, worth no more than \$2,000—some say only \$1,000—when brought to New York, and her cargo of coal was worth some \$1,600, as I must suppose, for the evidence does not disclose its exact value. The value of the property saved, is always an important element in determining what is a proper salvage.

This feature was not sufficiently considered by the pilots, when they demanded \$5,000 nor when they agreed on \$2,500. The latter is a larger sum than could be justly given for the salvage of property valued at \$3,600, accomplished under the circumstances shown here. The labor of the pilots was considerable through nine days, nor was it unattended with peril, and they might well receive for it \$2,500, or a larger sum, if only the property saved had been of greater value. But on a valuation of the property saved at \$3,600, \$2,500 is too much. If the brig had been derelict, \$1,800 would have been the salvage ordinarily awarded, and these salvors cannot claim to receive more than, or as much as if they had found the brig abandoned at sea.

I consider \$1,500 to be as liberal a reward as can be given to these salvors, out of this amount of property; for that sum they must have a decree. I give them also

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the costs, because the claimant offered them no particular sum in cash, before suit brought.

For libellants, *Barney, Butler & Parsons*.

For respondents, *Beebe, Donohue & Cooke*.

MAY, 1872.

THE STEAMER AMERICA.

TOW-BOAT AND TOW.—UNKNOWN OBSTRUCTIONS.—BURDEN OF PROOF.

A canal-boat, properly placed in a tow, was being towed up the Hudson river. While going at a proper speed, where the channel was wide and deep, she was struck under her bottom by something which made a hole in her, and caused her to sink. A libel to recover the damages was filed against the tow-boat:

Held, That, on the evidence, it appeared that while being towed in the ordinary and proper channel, the boat was struck by something under water, whose presence could not be known by any care exercised by those in charge of the tow-boat;

That, when it was shown by the tow-boat, that all care was taken to avoid obstructions, and that this obstruction was unknown, the burden of proof was shifted to the libellants, and that, in order to recover, they must prove that the sinking was caused by negligence, on the part of the tow-boat;

That, as they had failed in proving this, the tow-boat was not liable.

BENEDICT, J. This is an action brought by James McKeag, owner of the canal-boat A. W. Humphreys, to recover of the steamer America, the damages sustained by the canal-boat, while being towed by the America, from New York to Albany, on the night of the twenty-third day of August last.

The evidence shows, that the canal-boat was properly placed in the tow, and that, soon after the tow was fully made up, and while proceeding up the river by New

York, at a proper speed, this canal-boat was struck under her bottom by some hard substance, which, although it did not break her loose, or strike any other boat in the tow, made a hole in the bottom of this boat, which caused her to sink in a very short time.

No one is called who knows what struck the boat. The channel was there very deep, and nothing was seen to cause danger. But it appears that off 59th street, in the river there was at this time an old sunken crib, which was well known, and on which the boat might have struck in passing over it, and much evidence has been taken, as bearing on the question whether the boat was off 59th street, or above that point when she struck. Upon this question my conclusion is that, as the evidence stands, it cannot be found that the cause of the injury was striking the old crib off 59th street. The case is then one where the tow-boat shows, that the boat was properly placed in the tow, and that, while being towed in the ordinary and proper channel, she was struck under water by something whose presence could not be known by any care exercised by those in charge of the tow. In such a case the towing boat cannot be held liable. When, on the part of the tow-boat, it was shown that all care possible was taken to avoid all obstructions, and that the obstruction which hurt this boat was unknown, the burden of proof shifted to the libellants, and in order to recover they must show that the sinking was caused by negligence on the part of the tow.

There must therefore be a decree dismissing the libel with costs.

For libellants, *Wilcox & Hobbs*.

For respondent, *C. Van Santvoord*.

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Southern District of New York.

JUNE, 1872.

IN THE MATTER OF THE LIBEL AND PETITION OF THE PROVIDENCE AND NEW YORK STEAMSHIP COMPANY.

LIMITING LIABILITY OF SHIP OWNERS.—ACT OF 1851.—LOSS BY FIRE.—INJUNCTION.

A steam propeller, running between Providence and New York, was burned at her dock in New York, on May 24th, 1868, with a valuable cargo on board. Portions of the cargo were saved, but not in a condition to be delivered. The wreck of the vessel was sold for \$5,000. Various shippers of cargo on board the vessel commenced suits against the corporation which owned her, to recover for the loss of their goods. These suits were pending in the Courts of the States of New York, Rhode Island and Massachusetts. In 1872, the owners of the steam propeller filed a libel and petition in this Court, under the 55th, 56th, 57th and 58th Admiralty Rules of the Supreme Court, for the purpose of obtaining the benefit of the limitation of liability given by the Act of March 3d, 1851 (9 *U. S. Stat. at Large*, 635). On the filing of the petition, the Court made an order directing that an appraisement of the value of the interest of the petitioners in the vessel and her freight be made by the clerk, on proofs to be presented to him, and on hearing the petitioners and such of the parties as had begun suit in this District; and that notice of the hearing be given to the attorneys of such parties, and that, in the mean time, the said parties and their attorneys be enjoined from the further prosecution of those suits. One of those parties moved to set aside that order:

Held, That the proceeding thus instituted is a matter of exclusive Admiralty jurisdiction. It is substantially a suit *in rem* against the vessel and its pending freight;

That the Supreme Court had power to make the 55th Admiralty Rule, notwithstanding the provision in the Act of March 2d, 1793, § 5 (1 *U. S. Stat. at Large*, 335), that an injunction shall not "be granted to stay proceedings in any Court of a State;"

That the Rules, above named, do not transcend the Act of 1851, or the power of the Supreme Court to make rules, under the 6th section of the Act of August 23d, 1842 (5 *Id.* 518);

That the 3d section of the Act of 1851 was applicable to the case presented on the petition, although the loss was a loss by fire.

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BLATCHFORD, J. This libel and petition is filed under the rules in Admiralty (55, 56, 57 and 58) prescribed by the Supreme Court at the December Term, 1871, as rules of practice under the Act of March 3d, 1851, entitled "An Act to limit the liability of ship owners, and for other purposes" (9 *U. S. Stat. at Large*, 635). The petition avers, that the petitioners are a Rhode Island corporation, and were the owners of the steamship *Oceanus*, a vessel which belonged to a line of steam propellers owned and run by said corporation, for the carriage of freight and passengers between Providence, in Rhode Island, and the city of New York, and was enrolled at the office of the collector of customs in Providence; that, on the 23d of May, 1868, the *Oceanus* set sail from Providence, on one of her regular trips in said line, having on board a large and valuable cargo, belonging to several owners or freighters, who had shipped the same therein, to be carried on freight to New York, and there delivered to various consignees, according to the respective directions accompanying the same; that the vessel, with her cargo, arrived at New York on Sunday, the 24th of May, and made fast to the dock, in her usual berth, at pier 27, North river, and on that day discharged her passengers and their baggage, but none of her cargo; that, shortly after noon, on that day, a fire broke out in the buildings at or near the head of the pier where the vessel lay, which spread with great rapidity down the pier and soon reached the vessel, which was thereby burned to the water's edge, and almost the whole of her cargo was destroyed; that small portions of her cargo were discharged in a damaged condition, but wholly unmerchantable, and having lost the form of merchandise in which they were shipped, and no freight was earned or received by the petitioners on any portion of the cargo; that the remains of the steamer, left by the fire, did not exceed \$5,000 in value, and were shortly afterwards sold for that sum; that the said fire so happening

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to and on board of said vessel was not caused by the design or neglect of the petitioners, the owners of said vessel, but the same happened, and the same, and the loss, damage, injury and destruction resulting therefrom to said vessel and cargo, was done, occasioned and incurred without the privity or knowledge of the petitioners; that, nevertheless, certain persons, thereafter named, being, or claiming to have been, owners, shippers or consignees of portions of said cargo so burned and destroyed on said vessel, have sued the petitioners in the Courts of the State of New York, within the Southern District of New York, for the loss and destruction of such portions of said cargo; that the petitioners, desiring to contest their liability, and the liability of said vessel, for the loss, destruction, damage and injury occasioned by said fire, and also to claim the benefit of limitation provided for in the third and fourth sections of said Act, are ready and willing and offer to pay into Court the amount of their interest in said vessel and freight, or to give a stipulation, with sureties, for the payment thereof into Court, whenever the same shall be ordered; that the facts and circumstances by reason of which exemption from liability is claimed, in addition to the foregoing facts, are, that the steamer, which was in all respects properly manned and equipped for the service in which she was engaged, lay in her usual berth, fastened to the south side of said pier, her stern not being more than thirty feet from the bulkhead adjoining the head of said pier on the south, upon which bulkhead the buildings in which said fire broke out were situated; that, shortly after one o'clock in the afternoon, the fire broke out, and was discovered in an office or room in said building; that, although an alarm was immediately given, and the fire department was called to the spot, and they and the persons on board of and connected with said steamer used every effort to stay the progress of the fire, it spread with great violence and rapidity, and the wind,

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being right down the pier, carried the flames directly and very rapidly towards the vessel, so that it was found impossible to rescue her, or to remove her out of the reach of the fire, or to extinguish the flames after they had enveloped her, until she was burned and destroyed; that the said fire originated accidentally, and without fault, neglect or design on the part of the petitioners, or their knowledge or privity; that various parties, claiming as shippers, owners or consignees of portions of said cargo burned on said vessel, to large amounts, have commenced actions therefor against the petitioners in the Courts of the States of New York, Massachusetts and Rhode Island; and that the petitioners are ignorant of the actual value of all the cargo burned and destroyed by said fire on board of said vessel, but aver it to have exceeded \$100,000. The prayer of the petition is, that this Court will cause due appraisement to be had of the amount or value of the interest of the petitioners in the said vessel, and her freight for said voyage, and will either order the same to be paid into Court, or stipulation to be given by the petitioners, with sureties, for the payment thereof into Court, whenever the same shall be ordered, and will, upon compliance with such order, issue a monition against all persons claiming damages for the loss, destruction, damage and injury occasioned by said fire on board of said vessel, citing them to appear before this Court and make due proof of their respective claims, at a time to be therein named, as to all which claims the petitioners will contest their liability, and the liability of said vessel, independently of the limitation of liability claimed under said Act; that the Court will also designate a commissioner before whom such claims shall be presented in pursuance of such monition, and that, upon the coming in of the report of said commissioner, and confirmation thereof, if it shall appear that the petitioners are not liable for such loss, damage, destruction and injury, it may be so finally decreed by this Court,

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and, otherwise, that the moneys paid or secured to be paid into Court as aforesaid, after payment of costs and expenses, shall and may be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims; and that, in the mean time, and until the final judgment of the Court shall be rendered herein, this Court will make an order restraining the further prosecution of all and any suit or suits against the petitioners in respect of any such claim or claims, and particularly the said several parties who have commenced the said suits within this District.

On the filing of this petition, this Court made an order, directing that an appraisement of the amount or value of the interest of the petitioners in the said vessel, and her freight for said voyage, be made by the clerk of this Court, on proof to be presented before him, and after hearing the petitioners, and such of the parties who have commenced said actions within this District, against the petitioners, as may appear before him; and that, for that purpose, the clerk cause notice of the time and place of such appraisement and hearing to be served upon the attorneys in said actions of the said respective parties; and further ordering, that, in the mean time and until the report of the clerk in the premises, the said parties, and each of them, their agents and attorneys, refrain from the further prosecution of the said suits in the Courts of the State of New York.

A motion is now made on the part of the plaintiffs in one of the said suits, to vacate the said order.

(1.) It is claimed, in support of said motion, that the proceeding instituted by said petition is not a matter of exclusive Admiralty jurisdiction, but is a matter over which the State Court in which such suit is pending has concurrent jurisdiction with this Court. The exclusive original cognizance, given to the District Courts, of all civil causes of Admiralty and maritime jurisdiction, by the 9th section of the Act of September 24th, 1789 (1

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U. S. Stat. at Large, 76, 77), is there qualified only by this provision—"saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." Now, it is not doubtful, that the State Court is competent to enforce, by the remedy of a suit *in personam* against the owners of this vessel, according to the course of the common law, the claim of such plaintiffs. But that is not the remedy which the proceeding now instituted in this Court is primarily brought to enforce. This proceeding is substantially a suit *in rem* against the vessel and its pending freight, to which all persons claiming for a loss of cargo are to be summoned in as parties, in order to give to the owners of the vessel the benefit of the provisions of the Act of Congress limiting their liability. The proceeding, in that view, is one of Admiralty and maritime jurisdiction, which no State Court can administer. The common-law remedy in the State Courts, on behalf of each of the several plaintiffs, cannot co-exist with the rights conferred on the owners of the vessel by the Act of Congress; and the enforcement of such rights, under the 4th section of the Act, by the taking, by the owners of the vessel, of appropriate proceedings to apportion the sum for which they are liable among the several owners of property shipped on board of the vessel, on the same voyage, who have suffered the loss of such property, without the privity or knowledge of such owners of the vessel, cannot be had through any form of common-law remedy which the common law is competent to give. A State Court has no jurisdiction whatever over such a proceeding as that instituted by this petition. The 4th section of the Act, in saying that the appropriate proceedings may be taken "in any Court," to make such apportionment, and that it shall be a sufficient compliance with the Act, on the part of the owner of the vessel, if he shall transfer his interest in the vessel and freight, for the benefit of the claimants, to a trustee to be appointed "by any

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Court of competent jurisdiction," manifestly, in view of the maritime subject-matter, and of the character of the proceeding, which is not a common-law remedy, competent to be given by the common law, refers to a competent Federal Court, and not at all to a State Court. That the State Courts have not the requisite jurisdiction, and that the District Courts, as Courts of Admiralty and maritime jurisdiction, have jurisdiction of such a proceeding as this, is determined by the Supreme Court, in the case of *The Norwich and New York Transportation Co. v. Wright* (13 *Wall.* 104). The *res* being brought into this Court, to be distributed among those entitled to share in it, it necessarily follows that this Court must first adjudicate, as to each claimant, whether he is at all entitled to share in it, provided the ship owner chooses to raise the question, independently of any limitation of liability, that neither he nor his vessel is at all liable to such claimant in the premises. But this is incidental to the main purpose of the proceeding. In making the apportionment provided for by the 4th section of the Act, the amount of each claim that is to share must be ascertained by this Court. This involves the conclusion, in respect to any claimant, that he is not entitled to anything. There would be no justice in requiring the ship owner to admit a claim at the amount claimed, or at any other amount, as a condition of allowing him to bring the proceeding in this Court, when, in the suit in the State Court, he may, as he has a right to do, be asserting that he is not liable at all, as well as asserting that, if liable at all, he is only liable according to the limitation provided by the Act of Congress.

(2.) It is also contended that, although the 55th Rule in Admiralty provides that the District Court shall, "on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit and suits against said owner or owners, in respect of any such claim or claims," the Supreme Court had no

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power to make any such rule, in view of the inhibition contained in the 5th section of the Act of March 2d, 1793 (1 *U. S. Stat. at Large*, 334, 335). That section reads as follows: "Writs of ne exeat and of injunction may be granted by any judge of the Supreme Court in cases where they might be granted by the Supreme or a Circuit Court; but no writ of ne exeat shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the Court or judge granting the same, that the defendant designs quickly to depart from the United States; nor shall a writ of injunction be granted to stay proceedings in any Court of a State; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." By the Act of February 13th, 1807 (2 *U. S. Stat. at Large*, 418), power is given to the District Judges to grant writs of injunction in cases before the Circuit Courts of their Districts, under the restrictions prescribed by Act of Congress. The provision of the Act of 1793, in regard to staying proceedings in a Court of a State, is no broader or more stringent than the provision of the same Act in regard to giving notice of the application for an injunction. In the case of *In re Carlton* (5 *Law Reporter*, 120, and 1 *N. Y. Legal Observer*, 292), it was held by Mr. Justice Story, in the Circuit Court in Massachusetts, on a question certified to it from the District Court, as to whether a writ of injunction could be granted by the District Court in bankruptcy, without previous notice to the adverse party, that neither the Act of 1793, nor the Act of 1807, had any application to cases in bankruptcy in the District Courts, or to any cases except cases pending in the Circuit Court, in the exercise of its ordinary jurisdiction, and that the provisions of those Acts, in regard to notice of applications for injunctions, did not touch the jurisdiction of the District Court in the administration of equity in bankruptcy cases, under the

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bankruptcy Act of 1841. In consonance with that decision, it was held, by Judge Betts, in this Court, in *In re Smith* (1 *N. Y. Legal Observer*, 291), that the restriction as to notice, in the Act of 1793, applies only to cases pending in the Supreme or Circuit Court, and does not apply where, as under the bankruptcy Act, a new equity jurisdiction is created, and is conferred on the District Court in relation to matters pending in that Court, and within its cognizance exclusively. These views, in regard to the restriction as to notice, are equally applicable to the restriction as to staying proceedings in a Court of a State. Under the bankruptcy Act of 1867, it is the constant practice of the District Courts not only to restrain parties litigant in the State Courts, whenever it becomes necessary, in order to give force and effect to the jurisdiction and powers conferred upon the District Courts by the bankruptcy Act, but to grant such injunctions without previous notice. (See the cases collected in *Bump's Bankruptcy*, 5th edition, 267, 268, 542.) The jurisdiction created by the Act of 1851, and the rules of the Supreme Court passed to carry it into effect, may properly be called a new Admiralty and maritime jurisdiction conferred on the District Courts in relation to matters pending in them and within their exclusive cognizance. By the 14th section of the Act of September 24th, 1789 (1 *U. S. Stat. at Large*, 81, 82), this Court has power to issue all writs which may be necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law. The Supreme Court, in providing, by Rule 55, for the making, by the District Court, of an order to restrain the prosecution of suits against ship owners in respect of the claims mentioned in that Rule, manifestly intends that persons prosecuting suits in State Courts shall be restrained, and it has made no provision for giving notice of application for the restraining order. With full knowledge of the existence of the Act of 1793, it has prescribed a rule which pro-

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ceeds on the view that such Act does not apply, in either respect, to the new jurisdiction of the District Courts. Such view is, in my judgment, a sound one, and justified by the considerations already referred to. The making, by the District Court, of the order of restraint, may well be regarded as necessary to the exercise of its jurisdiction, an exclusive jurisdiction, and one which would be rendered futile and nugatory, if the claimants against the ship owner were permitted to proceed and collect from him their full claims, by suits, without regard to the Act of 1851, while this Court was endeavoring to administer the provisions of that Act, by giving to the ship owner the benefit of a limited liability in respect to all of the claimants. And, although the 4th section of the Act of 1851 provides that all claims and proceedings against the ship owner shall cease after a transfer by him, to a trustee, of his interest in the vessel and her freight, yet, under the broad language of Rule 55, and with a view to give to the ship owner the full benefit of the jurisdiction which he invokes, and which attaches by the filing of his petition in this Court, it is eminently proper that this Court, in conferring on a claimant the privilege, not required by Rule 55, of being heard on the appraisal, should stay his proceedings while the preliminary steps are being taken which are to result in putting into the hands of this Court, or of an officer of it, as a trustee, a sum of money, or a stipulation, representing the interest referred to in the 4th section, or such interest itself.

(3.) To the objection urged, that the Rules of the Supreme Court transcend the Act of 1851, in conferring the right to test the question of complete exemption, as well as of limited liability, and in confining the jurisdiction to the Federal tribunals, and in providing for restraining the prosecution of pending suits, it is sufficient to say, that this Court would not take it upon itself to impugn the validity of Rules so carefully considered as

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these manifestly have been, at least, unless there was a manifest repugnance in them to the Constitution or some Act of Congress. Independently of this, the views before stated serve to show that the provisions of the Rules do not transcend the Act of 1851, or the power of the Supreme Court, under the 6th section of the Act of August 23d, 1842 (5 *U. S. Stat. at Large*, 518).

(4.) The petition being filed, setting forth a case within the Act of 1851, it must necessarily rest with this Court to adjudicate, if and when issues are raised on such petition, whether such a case in fact exists. If it does not exist, the petition will be dismissed, and the pending suits will proceed. If it does exist, this Court will administer the relief prayed for by the petition. It is for this Court to determine whether the case is one of limited liability, within the 3d section of the Act, and it is to determine that question on issues framed on the petition, in the orderly manner of adversary litigation, in which the full right of review and appeal to which any party may be entitled, will be secured to him.

(5.) It is contended, that the 3d section of the Act of 1851 cannot apply to the present case, one of loss by fire, on the ground that, under the 1st section of that Act the ship owner is not liable for any loss by fire unless such fire is caused by his design or neglect; that, if the fire in this case was not caused by the design or neglect of the corporation, it is not liable at all, and there is no case for the operation of a limited liability, under the 3d section; and that, if the fire in this case was caused, as is insisted, by the neglect of the corporation, it must necessarily have been occasioned with the privity or knowledge of the corporation, and so not be within the 3d section. But it by no means necessarily follows, that because the fire happening to or on board the vessel was caused by the neglect of the corporation, so as not to give to it the benefit of the total exemption provided for

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by the 1st section, the loss by such fire of property shipped on board of the vessel was not a loss occasioned without the privity or knowledge of the corporation, so as to deprive it of the benefit of the limited liability provided for by the 3d section. The solution of the question must depend on the facts of the case as developed by judicial process, and may be in some degree influenced by questions growing out of the contracts of the parties, in reference to the liability of the ship owner, under the proviso of the 1st section of the Act.

The motion is denied.

E. D. McCarthy, for the motion.

J. H. Choate, opposed.

JUNE, 1872.

IN THE MATTER OF CHARLES S. WESTCOTT *et al.*, ALLEGED BANKRUPTS.

COMMERCIAL PAPER.—BONA FIDE DEFENCE.—ACT OF BANKRUPTCY.

A mercantile firm gave promissory notes as vouchers or memorandums, in exchange for notes of like amounts simultaneously given to them, but not as obligations to be paid at maturity. They did not pay them when they became due on their face, entertaining a *bona fide* belief that they had a good defence to them. The party to whom they were given filed a petition in bankruptcy against the firm :

Held, That the notes were not commercial paper, as between the firm and the petitioner;

That, even if they were such, the refusal of the firm to pay them, entertaining the belief which they did, was not an act of bankruptcy.

BLATCHFORD, J. The only act of bankruptcy set forth in the petition herein is, that the alleged debtors,

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as copartners, under the name of C. S. Westcott & Co., made seven promissory notes, to the order of the petitioner, for various sums, which notes became due at various times in August, September and October, 1871, and that such notes have not been paid, the last of them having matured October 20th, 1871, and the petition having been filed November 8th, 1871.

(1.) The evidence shows that the notes were given merely as vouchers or memorandums, in exchange for notes of like amounts simultaneously given by the petitioner to the firm of C. S. Westcott & Co., and were not given as obligations to be paid at maturity by their makers. They had no United States internal revenue stamps upon them when given, and it is not shown that the makers had any intention that such stamps should be put upon them. They were in form negotiable, but, on the facts of the case, they cannot, in any proper sense, be called the commercial paper of the makers, as between them and the petitioner.

(2.) If they could be considered as commercial paper, the evidence is that their makers did not stop or suspend payment of them, in the sense of the statute. They entertained a *bona fide* belief that they had a good defence or set-off to them, and that, upon all the transactions between them and the petitioner, of which there were a large number, involving large sums of money, independently of the notes in question, the petitioner, even taking these notes into account, was indebted to them, instead of their being indebted to him. Whether this is in fact so or not, it is of no importance to determine, in this proceeding. It is enough that the alleged debtors could and did honestly entertain the belief that they were not legally bound to pay the notes till it should be so adjudged. The case is not one for an adjudication of bankruptcy, but for a suit on the notes in a proper tribunal. The principles applicable to it are those set forth in the recent decision in this Court in

In the Matter of Louis H. Rosey, a Bankrupt.

In re The Hercules Mutual Life Assurance Society of the United States (*ante*, p. 35).

The petition is dismissed, with costs.

J. M. Guiteau, for the petitioner.

Starr & Hooker, for the respondents.

JUNE, 1872.

IN THE MATTER OF LOUIS H. ROSEY, A
BANKRUPT.

SECOND MEETING OF CREDITORS.—DISCRETION OF REGISTER.

If the assignee, after three months from the adjudication in bankruptcy, requests the Court to call a second general meeting of creditors, it must be called, and the register has no discretion to refuse to call it.

THE register in this case certified to the Court, that the assignee had applied to him in writing to call a second general meeting of creditors, under the provisions of the 27th section of the bankruptcy Act, which request was accompanied by the report and account of the assignee, in compliance with an order of the register; and that he had, for reasons which he deemed sufficient, and which he certified to the Court, refused to call the meeting.

BLATCHFORD, J. I regard the provision of section 27 of the Act as imperative, that where the assignee, at the expiration of three months from the date of the adjudication of bankruptcy in a case, requests the Court so to do, a second general meeting of the creditors must be

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called. General Order No. 19, as it now reads, does not conflict with or abrogate the provisions of section 27. It requires the assignee, at the expiration of three months from the date of the adjudication of bankruptcy, to file a report with the register, and also a statement as to the matters set forth in such Rule. Then if the register shall judge it expedient, he may order that the second general meeting of creditors be called, although the assignee does not so request.

Eastern District of New York.

JUNE, 1872.

THE STEAMSHIP CITY OF WASHINGTON.

COLLISION AT SEA.—STEAMER AND PILOT BOAT.—LIGHTS.—BURDEN OF PROOF.

A steamer, bound to the westward, discovered the flash lights of a pilot boat to the northward, about abeam. She replied to them, indicating that she wanted a pilot, and changed her course to N. W. by N. The pilot boat changed her course to the southward and westward to meet the steamer, showing her torches as she proceeded. The wind was fresh. When the vessels were four or five lengths apart, the courses of the vessels were crossing, and the starboard side of the steamer was the lee side. She showed a light on that side to guide the pilot to his place, and a pilot left the pilot boat in a yawl, having with him a light, to board the steamer. The steamer was kept in motion, and starboarded her helm, and, before the yawl boat reached her, she ran into the pilot boat and sank her. The pilot boat had no masthead light, but the light, which the pilot carried as he went into the yawl, was seen by those in charge of the steamer :

Held, That the steamer was in fault, in not stopping still before she reached the pilot boat, and also in starboarding her helm ;

That the burden was on the pilot boat of proving that the absence of the masthead light, which she should have carried, did not contribute to the collision ;

The Steamship City of Washington.

That, as the exact position of the pilot boat was known to those in charge of the steamer, and as the absence of the masthead light was not set up in the answer of the steamer as an act of negligence, the absence of the masthead light did not contribute to the collision, and the steamer must be held solely liable.*

BENEDICT, J. This action is brought by Peter A. Baillie and others, owners of the pilot boat John D. Jones, to recover of the steamship City of Washington some twenty thousand dollars, for the sinking of the pilot boat, in a collision which occurred between those two vessels on the night of March 28th, at sea, and about 200 miles from Sandy Hook.

The steamer, bound to the westward, at about 11 P. M. discovered the flash lights of a pilot boat to northward, about abeam, and some four or five miles distant. She replied to the signals, indicating that she wished to receive a pilot from the boat, and altered her course to about N. W. by N., to meet the boat. The boat, on her part, kept away to the southward and westward to meet the steamer, showing her torches as she proceeded. The courses of the two vessels were thereafter crossing each other, with a fresh breeze of wind.

When the two vessels had approached within four or five lengths of each other, the steamship had hauled up sufficiently to make her starboard side the lee side, and she showed a light on her lee side to guide the pilot to his place to board the steamer; and a pilot left the pilot boat in the yawl, having with him a light, to pull to the light on the starboard side of the steamship. Before the pilot had time to reach the steamer in the yawl, the pilot boat was under the steamer's bows, and was struck by the steamer on her port side, causing her to sink and be lost.

The negligence charged upon the steamer as the cause of this loss, is, that she starboarded her helm, whereby the pilot boat was brought under her bows, and

* This decision was affirmed by the Circuit Court on appeal.

The Steamship City of Washington.

that she did not back in time to stop her way before she struck the pilot boat.

The starboarding is admitted in the answer, and, under the circumstances disclosed by the evidence, I consider it negligence. The course of the pilot boat was known to be crossing that of the steamship, the breeze was fresh, and it was known to the steamship that at her request the pilot boat was endeavoring to place a pilot on board her. This manœuvre the pilot boat was entitled to be permitted to accomplish without embarrassment from the steamer. Certainly the steamer, by starboarding and giving herself a course across the course of the pilot boat, while the yawl, which was to be picked up by the boat after the pilot was placed on the steamer, was in the act of passing to the steamer, attempted a manœuvre which cast upon her the risk of its success.

I think, also, that it was the duty of the steamship to stop still before she reached the pilot boat, instead of which she was kept moving ahead—slowly it is true, but yet with a momentum which, with the starboarding, brought her upon the pilot boat and sank her. I must, therefore, hold the steamer responsible in this action, by reason of these faults. The only remaining question is, whether the pilot boat must not also be held in fault for not having the masthead light, which the law requires. It is conceded, that the pilot boat had no such light, and the burden is, therefore, on the pilot boat to show that the absence of such a light did not contribute to the collision. This is made to appear by the clear proof given by the witnesses for the steamship, that the other lights of the pilot boat were seen by them. Her exact position was known by those on the steamship, as appears from the fact, that they saw the light which the pilot carried when he went into the yawl. I consider, therefore, that the evidence shows, beyond dispute, that the absence of the masthead light in no way contributed to

Hill v. Murray.

the accident. Furthermore, the absence of the masthead light is not set up in the answer as an act of negligence, nor is its absence alluded to therein.

I, therefore, cannot hold that the fault of the pilot boat, in not having a masthead light, renders her chargeable with any part of the loss.

The decree will accordingly be in favor of the libellants, with an order of reference.

For libellants, *Scudder & Carter*.

For respondents, *Platt, Gerard & Buckley*.

JUNE, 1872.

HENRY HILL *et al.* v. ROBERT MURRAY, JR.

SEAMEN'S WAGES.—VOYAGE BROKEN UP.

A vessel was run on a reef in a well-known channel, where there was plenty of room, and was lost. The master was a man of experience in the waters, and accounted for the occurrence by his chronometer being wrong. The sailors brought suit against the owner of the vessel, to recover wages for the whole voyage, alleging that the voyage was broken up by fault of the owner:

Held, That, as it did not appear that the accident was the result of negligence, or incompetency of the master, or that, when the vessel sailed, the chronometer was not a proper one in good order, it could not be held that the voyage was broken up by fault, fraud or neglect of the owner.

BENEDICT, J. The demand of the libellants is for wages for the whole of a voyage for which they shipped, which, as they aver, was broken up by the fault of the owner. The faults charged are, in providing a negligent or unskilful master, who ran the vessel on shore, and in omitting to furnish the vessel with a proper chronometer, which misled the master as to his position, and

The Brig Lola.

caused the accident. The proofs show that the vessel did run on a reef, in the night, in a well-known channel where there was plenty of room, but they fail to show that this accident was the result of the negligence or the incompetency of the master.

The experience of the master in the waters, where the accident occurred, is not disputed, and no particular act of negligence on the part of the master is proved to which the accident is chargeable. The master accounts for the disaster, by the condition of his chronometer, but there is no evidence, that when the vessel sailed from port the chronometer was not a proper one in good order.

Upon such proofs it cannot be held, that the breaking up of the voyage was owing to the fault, fraud or neglect of the respondent.

The libel must therefore be dismissed.

For libellants, *A. Nash*.

For respondent, *Goodrich & Wheeler*.

JUNE, 1872.

THE BRIG LOLA.

SEAMAN'S WAGES.—AGREEMENT OUTSIDE THE SHIPPING ARTICLES.—
DURESS.

The shipping articles are not conclusive evidence of the contract of a sailor with the ship:

Effect must be given to an agreement by the shipping agent, made at the time the sailor signed the articles, and understood by the sailor to form part of the agreement, but not embraced in the articles.

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A seaman signed articles in New York, on board a British vessel, for a voyage to Dunkirk, at \$40 a month. At the time, it was stated to him that the voyage would end in New York. On the arrival of the vessel at Dunkirk, the seaman was discharged and reshipped at \$20 a month. On the return of the vessel to New York, he left her, and brought suit for his wages:

Held, That the agreement by the seaman was that the voyage should end in New York; that the subsequent agreements made by him, were made under duress, and were not binding on him; that he had the right to leave the vessel on her return to New York, and was entitled to be paid at the rate of \$40 a month.

THE libellant in this case alleged that he shipped on board the *Lola*, in New York, at the rate of \$40 a month, for a voyage to a port in Great Britain, thence to a port in the Mediterranean, and back to New York; that the vessel sailed from New York to Dunkirk, in France, where the master wrongfully discharged him, but offered to reship him for \$20 a month, which he accepted under duress; that the vessel sailed from Dunkirk to Swansea, where he signed articles at \$20 a month, and after he had signed them learned that they were articles for a voyage to New York, and back to a port in Europe; and that the vessel then came to New York, and there the libellant left her, the voyage for which he originally shipped being completed. And the libellant claimed to recover wages at \$40 a month, for the voyage.

The owners of the ship denied the agreement first alleged, and set up that the libellant shipped in New York, and signed articles for a voyage to Dunkirk only, and was there paid off, and discharged, and reshipped and made the other agreements alleged by him, and that his leaving the ship in New York, where he did, was a desertion, which forfeited all wages due him.

For libellant, *Henry Morris*.

For claimants, *Goodrich & Wheeler*.

BENEDICT, J. I have no doubt as to the proper decision to render in this case. The question to be deter-

The Brig Lola.

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The experience of the master in the waters, where the accident occurred, is not disputed, and no particular act of negligence on the part of the master is proved to which the accident is chargeable. The master accounts for the disaster, by the condition of his chronometer, but there is no evidence, that when the vessel sailed from port the chronometer was not a proper one in good order.

Upon such proofs it cannot be held, that the breaking up of the voyage was owing to the fault, fraud or neglect of the respondent.

The libel must therefore be dismissed.

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For respondent, *Goodrich & Wheeler*.

JUNE, 1872.

THE BRIG LOLA.

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Held, That the agreement by the seaman was that the voyage should end in New York; that the subsequent agreements made by him, were made under duress, and were not binding on him; that he had the right to leave the vessel on her return to New York, and was entitled to be paid at the rate of \$40 a month.

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The owners of the ship denied the agreement first alleged, and set up that the libellant shipped in New York, and signed articles for a voyage to Dunkirk only, and was there paid off, and discharged, and reshipped and made the other agreements alleged by him, and that his leaving the ship in New York, where he did, was a desertion, which forfeited all wages due him.

For libellant, *Henry Morris*.

For claimants, *Goodrich & Wheeler*.

BENEDICT, J. I have no doubt as to the proper decision to render in this case. The question to be deter-

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mined first, is, what was the contract made by the libellant, when he shipped in New York. The shipping articles are not the sole evidence of that contract, for effect must be given to an agreement by the shipping agent, made at the time when the articles were signed, and understood by the seamen to form part of the contract, where such agreement is clearly proved. Statements, representations and agreements made with seamen by shipping notaries, when the articles are signed, bind the ship, and that without reference to the instructions which the captain has given the notary. When the ship owner allows a shipping agent to employ a crew for him, he holds out to the seamen, that the shipping agent has authority to bind the ship by the contract which he makes. So, whatever was the bargain made in this case, between Ferris, the shipping agent, and this man, at the time of the shipment in New York, that binds the ship.

Now that bargain is proved not only by the libellant, but also by the landlord. They both say that the bargain was that he should go on a voyage, which they describe, which voyage was to end in New York, and at \$40 a month wages. I see no reason to doubt this evidence. The landlord has been examined in Court, and appears reliable, and says that he asked the shipping agent himself what the voyage was, and was told that it ended in New York, in which the landlord simply did his duty by the sailor. This contract is not denied by Ferris, the shipping master, who gave his evidence with very proper frankness. He says that he don't recollect what he did say, and cannot swear that he didn't make the contract which the libellant swears to. There is no improbability in the statement of such a contract, because Ferris says such understandings were common in this class of vessels. There would be improbability in any other understanding, because this man had a family here, and he had shipped several times out of this port, and would not be very likely to make a contract to be left in

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a foreign and strange port. The rate of wages is consistent with the libellant's story, for although cooks were shipped at thirty-five dollars a month, yet it is quite clear from Ferris' statement that they were shipped at from \$35 to \$40, and this man got \$40. That the agreement was as the libellant states, is further clearly indicated by the way the man acted when the captain proposed to discharge him in France. He was quite excited about it, and cried, and applied to the mate to induce the captain not to leave him there. It is manifest that when he shipped he never thought of being left in that place.

The talk about incompetency in the case amounts to nothing. The captain took the man through the whole voyage as cook and steward, and offers no proof of any neglect of his duties. The captain says he did not like him—and quite likely he did not like him as well at \$40 a month as he would have at \$20. He was satisfied with him at that rate. It is said the man expressed himself as thankful to continue in the ship at the reduced wages. Of course he was, because the captain had threatened to use the power which he possessed, to leave him behind in a strange place, and he, of course, made no subsequent complaint, and when asked, signed new articles at \$20 a month, without objection.

But these subsequent articles amount to nothing. They were all executed under duress in law, and do not bind the seaman. The contract which he made when he shipped for the voyage which he performed is the only contract binding upon him; and when he completed that voyage in New York he had a right to leave the ship and demand his wages, at the rate which I find upon the evidence the ship agreed to pay him, namely, \$40 a month.

Let there be a decree for the libellant for the wages at \$40 a month, less any payments made to him.

JUNE, 1872.

THE FERRY-BOAT QUEENS COUNTY.

COLLISION IN EAST RIVER.—STEAMBOATS CROSSING.—SIGNALS.—
STOPPING.

The steamboat S., coming down the East river, saw on her starboard hand the ferry-boat Q. lying in the river waiting to enter her slip, and heading down the river. The S. blew two whistles and kept on her course. The Q. started ahead, and swung in to go to her slip, across the course of the S., and both vessels kept on without stopping, till the S. was struck on her starboard side by the Q. :

Held, That both vessels were in fault, in keeping on, after each had been notified that the other was taking a course which made a collision inevitable, if both kept on.

THIS was a libel, filed by the owners of the steamboat *Sylvan Glen*, to recover for the damages received by her in a collision with the *Queens County*, which happened about daybreak on the morning of December 30th, 1869. The *Sylvan Glen* was on a trip from Harlem to New York. She came down the east channel, between Blackwell's Island and Long Island. She alleged that, when she was at the lower end of Blackwell's Island, the *Queens County* was seen lying in the middle of the river, below and on the starboard hand of the *Sylvan Glen*, heading down the river; that the *Sylvan Glen* blew two whistles to notify the *Queens County* of her intention to keep on and pass between her and the Long Island shore, and, receiving no signal of dissent from her, kept on, and, seeing that the *Queens County* was moving down the river, repeated the two whistles; that the *Queens County*, instead of keeping her course, as she should have done, starboarded her wheel and crowded on the *Sylvan Glen*, which blew two whistles a third time, and also starboarded her wheel and kept as far towards

The Ferry-boat Queens County.

the Long Island shore as she could, but was struck by the Queens County on her starboard side.

The Queens County, in answer, said that she was a ferry-boat, running between 34th street, New York, and Hunter's Point, L. I. ; that she was at the time on a trip from New York ; that the slip at Hunter's Point, being temporarily occupied by her sister boat, she waited off in the stream, heading to the southward ; that the lights of the Sylvan Glen were seen coming down along by Blackwell's Island, and the Queens County blew one whistle, and, when her sister boat came out of the slip, started ahead to enter it, and, after having gone some ways, heard two whistles for the first time from the Sylvan Glen, which was trying to pass ahead of her and between her and the Long Island shore, and that the collision then could not be avoided.

Neither vessel stopped until the collision.

For the Sylvan Glen, *Benedict & Benedict*.

For the Queens County, *Beebe, Donohue & Cooke*.

BENEDICT, J. This appears to be a clear case of mutual fault. The Sylvan Glen was in fault, for holding on to her course and speed, after she saw that the Queens County had begun to move in towards her slip. Assuming that the Queens County was wrong in moving across the course of the Sylvan Glen, after being notified by the whistles from the Sylvan Glen of the course she intended to take, still that did not give the Sylvan Glen the right to keep on at full speed, until she was struck, when, by stopping, a collision manifestly impending could have been avoided.

The Queens County was equally in fault, for keeping on her speed and her course towards her slip, when she had been notified of the course of the Sylvan Glen, and could easily see that by keeping on she would come in

The Brig Monte Christó.

contact with the Sylvan Glen. Assuming that the course which she took after the whistles from the Sylvan Glen, was crossing the course of the approaching vessel, and that it then became the duty of that vessel to pass under her stern, still the Queens County was notified by the whistles, that the Sylvan Glen was claiming the right to hold the course which she had taken to pass to east; and yet, with danger of collision plainly indicated, the Queens County kept on her course, without stopping until the moment of collision. In this she was guilty of fault.

The damages must accordingly be apportioned.

JUNE, 1872.

THE BRIG MONTE CHRISTO.

FRAUDULENT REGISTER.—FORFEITURE OF VESSEL.—BONA FIDE PURCHASER.

An American register was obtained for a British vessel, under the Act of December 23d, 1852 (10 *U. S. Stat. at Large*, p. 149), on the statement that she had been wrecked off Cape May, which statement was false, and that repairs to an amount exceeding her previous value, had been put on her, a forged receipt for the payment of such repairs being exhibited. This American register was used by the person claiming to be owner, and he afterwards sold the vessel to a *bona fide* purchaser:

Held, That the vessel was forfeited to the United States, by virtue of the 27th section of the Act of December 31, 1792 (1 *Stat. at Large*, p. 298); That this forfeiture was not defeated by a sale to a *bona fide* purchaser.

BENEDICT, J. The evidence in this case establishes the following facts, to wit: that in the month of September, 1869, an American register was obtained for the British brig W. B. Forest, under the Act of the 23d of De-

The Brig Monte Christo.

ember, 1852, by means of the false and fraudulent statement, that the brig had been wrecked off Cape May, within the waters of the United States, then brought to this port and sold for \$975, and repaired to the amount of \$3,825. These statements, upon which an American register was issued to her, under the name of the brig Monte Christo, have been proved to be pure fabrications without foundation in fact. The vessel was repaired to the amount stated during that season, by Messrs. C. & R. Poillon, whose bill was falsely stated to have been paid, and a forged receipt exhibited as evidence of the payment, but she was never wrecked as stated, and her repairs did not equal three fourths of the cost of the vessel when repaired. At the time of this fraud, the person claiming to be the owner of the vessel was one Jno. W. Currier; and the evidence discloses plainly, that the fraud was perpetrated with his knowledge, connivance, and procurement. In September, 1869, this American register, to the benefit of which the vessel was not entitled, was used by the vessel, with the knowledge of Currier, who took the oath of ownership and dispatched her on a voyage under it. The vessel thereupon became forfeited to the Government, by virtue of the statute of December 31, 1792, sec. 27, which declares, "that if any certificate of registry or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this Act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture." (1 Stat. at Large, p. 298.)

The forfeiture created by this statute, as well as by the Act of July 18, 1866, under which the evidence also brings this case, is absolute; and in such case it is well settled that the forfeiture, is not defeated by a sale to a *bona fide* purchaser. It is therefore unnecessary to consider the evidence offered to show that the claimant Franklin was a *bona fide* purchaser of the vessel, or to

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determine whether either he or the master, who has contracted to buy her, are chargeable with knowledge of the fraudulent character of the register under which the vessel has been sailed.

There must therefore be a decree condemning the vessel.

For the United States, *B. F. Tracy, U. S. Dist. Atty.*

For claimant, *Beebe, Donohue & Cooke, and J. M. Guiteau.*

Northern District of New York.

JUNE, 1872.

IN THE MATTER OF WILLIAM HENNOCKSBURGH AND MARX BLOCK, BANKRUPTS.

TIME WHEN DEBT IS PROVABLE.

A debt, existing at the time of the adjudication in bankruptcy, but not existing at the time of the commencement of the bankruptcy proceedings, is provable in bankruptcy.

The case of *In re Crawford* (3 *Bank. Reg.* 171), dissented from.

A suit for assault and battery, having been commenced against the bankrupts prior to the commencement of the proceedings in bankruptcy, was continued to judgment before the adjudication, no leave of the bankruptcy Court having been obtained:

Held, That, as the claim was not provable until the judgment was obtained, it was not necessary to obtain such leave.

HALL, J. The assignee in this case having applied for an order expunging the proof of debt made therein

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by Mary O. Bainbridge, and she having appeared by attorney to oppose such application, it was stipulated that the matters in controversy should be submitted and decided upon the papers and written briefs left with the clerk, without other argument. The alleged indebtedness is a judgment rendered in the Supreme Court of this State upon a verdict taken against the bankrupts on the 20th September, 1870, in an action brought by the said Mary O. Bainbridge, against the bankrupts, for an assault and battery and false imprisonment. The suit in which the verdict was rendered was commenced in May, 1869; and the final judgment therein was perfected and docketed in Onondaga county, in which the bankrupts resided, October 6, 1870. The judgment was confessedly *in tort*, for a personal injury to the plaintiff; and it is clear that her claim was not a provable debt until the judgment was entered.

The petition in bankruptcy was filed against the bankrupts July 28, 1870; but it appears from the papers on file that no adjudication was made under the order to show cause granted on that day and made returnable on the 16th of August, 1870; and that on the 28th of September, 1870, an *alias* order to show cause was granted, upon the same petition, and was made returnable on the 25th of October of that year. On the last named day an order of adjudication was granted;—no one appearing to oppose.

The assignee insists that the debt proved was not provable, because there was no *debt* until the judgment was entered; and he insists, that the judgment was not entered until after the adjudication. As the date of the adjudication does not appear upon the papers submitted, it may be that he had overlooked the fact that the judgment was docketed nearly three weeks before the actual adjudication; or it may be that, under the decision to that effect hereinafter cited, he has regarded the time of

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the filing of the petition as the time of the adjudication, for the purposes of the present question.

The assignee also insists that even if the claimant had a valid debt at the time of the adjudication, it cannot be proved in these proceedings, because the suit was continued and a verdict and judgment taken, after the petition in bankruptcy was filed, without the leave of the bankruptcy Court.

No doubt would have been entertained upon the question presented, if the judgment had been in fact entered after the actual adjudication in bankruptcy made on the 25th of October, 1870. Until the judgment, the plaintiff had no *provable* debt; for her claim, as before stated, was simply and purely a claim for damages for a personal injury, and such damages are not provable unless liquidated and transmuted into a legal *debt* by a judgment obtained before the filing of the petition in bankruptcy or before the adjudication, as the one or the other of these is to be considered as fixing the time when a debt must exist to be provable in bankruptcy.

In this case the actual adjudication was granted after judgment perfected, and if a debt, existing at the time of the actual adjudication, but which did not exist at the time of the filing of the first petition in bankruptcy, is not provable, the proof of debt must be expunged.

There is some want of clear and certain and consistent expression in the bankruptcy Act in respect to this question. The first clause of the 19th section of the Act, if it stood alone, would seem to be decisive of the question; and it is entitled to much weight, as being the first and a most important general provision of the act in reference to the character and description of the debts which may be proved. By this clause it is provided "that all *debts* due and payable from the bankrupt *at the time of the adjudication of bankruptcy*, and all *debts then existing*, but not payable until a future day, a rebate of interest being made when no interest is payable by the

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terms of the contract, may be proved against the estate of the bankrupt." In the third clause of the same section it is provided, that "if the bankrupt shall be bound as drawer, indorser," &c., &c., * * * "and his liability shall not have become absolute until after *the adjudication of bankruptcy*, the creditor may prove the same after such liability shall have become fixed," &c. In another portion of the same section, provision is made for proving a claim for rent, &c., falling due at fixed and stated periods; and it is provided that "the creditor may prove for a proportionate part thereof *up to the time of the bankruptcy*."

By the terms of the 11th section it is provided, that the filing of a voluntary petition is an act of bankruptcy; and that the petitioner shall be adjudged a bankrupt;—which adjudication, under the 4th section of the Act, may be made, if there is no opposing interest, by the register to whom the case is referred. In involuntary cases of bankruptcy, the adjudication cannot be made in less than five days from the filing of the petition, unless the debtor appears and consents, and it may not take place (as in this case) until months after the petition is filed, whether the case be one of voluntary or involuntary bankruptcy. I think the fair construction of the Act is, that a petitioner or debtor is not to be deemed a bankrupt, within the contemplation of the provision for the proof for rent, &c., just alluded to, until the order of adjudication is made; and that the time of the actual adjudication of bankruptcy is the time referred to in this provision, in regard to the proof of rent, &c., unless, indeed, the other portions of the bankruptcy Act require the Court to say, that the time of the filing of the petition in bankruptcy, and not the time of the adjudication of bankruptcy, is the time intended, where the "adjudication of bankruptcy" is mentioned in section 19.

I confess that my own impressions are against such

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construction. The filing of the first petition (being a petition for an adjudication in bankruptcy, whether the case is one of voluntary or involuntary bankruptcy), is many times referred to in the Act; and, by section 38, it is declared to be, not an adjudication, but *the commencement of proceedings under the Act*. The time of filing of the petition, and the time of adjudication, are several times referred to, in other sections of the Act, in such manner as to show that Congress was, or should have been, fully aware that the adjudication of bankruptcy was, in all cases, to be made subsequent to the filing of the petition, and that, in many cases, it would necessarily be made several days, if not weeks or months, after the filing of the petition, as in most cases of involuntary bankruptcy. The registers are authorized to make adjudication of bankruptcy in voluntary cases; but the petition is to be filed with the clerk, and afterwards referred to the register for his action. The filing of the petition, and the adjudication of bankruptcy, are clearly and frequently recognized by the general bankruptcy Act, as different in point of time. Section 14 makes the assignment relate back to the commencement of the proceedings in bankruptcy (by the filing of a petition, see section 38); and the "time of the filing of the petition" is referred to in section 20. "*The time of adjudication*" is referred to, in section 21, as the important time to be regarded, in respect to the proof of certain debts or liabilities of the bankrupt; and, in section 27, it is provided that the wages due to operatives, clerks, or house servants, for which preference is given by the Act, must be for labor performed "within six months next preceding the *adjudication of bankruptcy*," not the commencement of proceedings, unless the one means the other.

By the same section, the second meeting of creditors is to be called "at the expiration of three months from the *date of the adjudication*," &c.; and, by section 29, the

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application for a discharge, in certain cases, is to be made "at any time after the expiration of six months *from the adjudication of bankruptcy*," and "within one year from the adjudication of bankruptcy." In the same section it is provided that certain acts, if "done within four months before the commencement of such (bankrupt) proceedings," shall bar his discharge; and, in section 32, the form of a discharge is given, in which "the day the petition was filed by (or against) him," (the bankrupt) is referred to. In section 35, the time of "the filing of the petition by or against him" (the bankrupt) is twice referred to. The 39th section refers to "*the order of adjudication*," and shows that the order in involuntary cases cannot be made, except by consent, until at least five days after the service of the petition. Section 44 uses the terms, "after the commencement of proceedings in bankruptcy," and "before the commencement of proceedings in bankruptcy."

When we consider the fact, that the filing of the petition by which the proceedings in bankruptcy were commenced, and the adjudication under it, are entirely different acts, to be performed by different persons, and at different times, and, in some cases, at times widely different from each other, it is difficult to conclude that Congress intended "the time of filing the petition," or the time of "the commencement of proceedings in bankruptcy," in the cases where they have omitted the use of either of such or like expressions so often found in the Act, and have used instead, and over and over and over again, the expression "the time of the adjudication of bankruptcy." It is only by the exercise of a power of construction which may, perhaps, be properly termed judicial legislation, that it can be held that Congress did not mean what they have expressed, in clear and unequivocal terms, but did mean what they did not say; although other parts of the Act afford sufficient evidence that they

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could and did use proper and unequivocal language to express the intention in respect to time, imputed to them by the construction, which gives to the language used a meaning and effect entirely different from that expressed.

The language used in giving the form of a discharge (sec. 32) would seem to limit its effect to provable debts which existed on the day the petition was filed, by or against the bankrupt; but section 34, in declaring its effect, provides that, with the exceptions referred to, it shall "release the bankrupt from all debts, claims, liabilities and demands, *which were or might have been proven* against the estate in bankruptcy." So that the debt of the creditor, in this case, if provable, will be barred by the bankrupt's discharge.

It may be conceded that the bankruptcy Act would have been more harmonious, in its language, and its expressed provisions, in relation to the proof of debts, more in accordance with what may properly be deemed the general policy and purpose of the Act, if it had expressly provided that only debts existing at the time the petition was filed, by or against the bankrupt, could be proved; and it is not, perhaps, surprising that it has been held by the learned Judge of the Eastern District of Michigan, to be the duty of the Court to give to the provisions now in question a construction deemed more in accordance with such general policy and purpose, than the construction which would necessarily be given to the language upon which the question mainly depends, if the general purpose and policy of the Act was not deemed to require a different construction. In the case referred to (*In re Crawford*, 3 *Bkt. Reg'r*, 171), it was held, that it was the intention of the Act that such debts, and such only, as existed at the time of the filing of the petition for adjudication of bankruptcy, are provable against the bankrupt's estate. The original claim of the creditor, in that case, would have been provable, if no judg-

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ment had been obtained upon it after the filing of the petition in bankruptcy, and although the learned judge held that it was the judgment only which was provable, and that the debt, on which the judgment was rendered, was not provable, because it was merged in the judgment, he yet held, that the costs which might have accrued subsequent to the time of filing the petition, could not be said to constitute a claim or debt existing at that time, and should, therefore, be excluded in making up the amount upon which dividends were to be made in the bankruptcy proceedings.

After much hesitation, I have concluded to act upon my own judgment in the present case, notwithstanding the decision in the case of Crawford. The learned judge who decided that case, felt at liberty to express his dissent from opinions delivered by other learned judges; and in the case of Williams (2 *Bkt. Reg'r*, 69), Judge Shipman appears to have considered that the question, whether a debt was provable depended upon the question, whether it existed at the time of the adjudication of bankruptcy. On the other hand, Judge Blatchford, in the case of Patterson (1 *Benedict's Reports*, 509), expressed an opinion, that debts, to be provable, must have existed at the time of the commencement of the proceedings in bankruptcy. The question did not, however, arise in that case, and in the subsequent case of The New York Mail Steamship Company (2 *Bankrupt Register*, 170), I understand that the learned judge decided that the proper charges of the attorneys and counsel of the bankrupt, for their services in resisting the adjudication, were provable in such bankruptcy proceedings, because such services were rendered prior to the adjudication in bankruptcy, although after the petition for adjudication was filed.

There is certainly much reason for supposing that Congress deliberately adopted the time of the actual adjudication of bankruptcy, as the time at which a debt must exist

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in order to be provable, in contradistinction to the time of the commencement of the proceedings in bankruptcy. It was apparent, upon the face of the Act, that, in many cases, the adjudication would not be made until a considerable time after the proceedings were commenced, and that, in all, some time must elapse between the filing of the petition and the adjudication. It was also apparent that the Act made no provision for giving any notice of the filing of the petition until after the actual adjudication, and that a warrant was then to issue to the marshal requiring him to publish *forthwith* in the designated newspapers, and to send to the creditors of the bankrupt, the required notices of such proceedings in bankruptcy. This warrant is required to be issued *forthwith* after the adjudication;—thus evidencing the intention of Congress to give the public, especially those who had dealings with the bankrupt, *immediate* notice of the adjudication in bankruptcy, in order that persons might not longer trust him as worthy of credit, or otherwise deal with him in respect to his property; and the adoption of the language used, under these circumstances, affords strong evidence that Congress intended what is repeatedly expressed in the Act. It may well have been considered, that no one was likely to trust the bankrupt, with knowledge that proceedings in bankruptcy had been commenced against him, and that it was just and equitable that those who had trusted the bankrupt, in ignorance of the proceedings against him, on the evidence of his solvency, afforded by his possession and apparent ownership of property, should be entitled to prove their debts, and receive dividends from such property, instead of looking solely to a declared bankrupt, just stripped of his property for the benefit of other creditors having no stronger equities. Other reasons of a similar character might be stated, but, as this case is likely to be presented to the circuit, for review, it will be disposed of without further discussion of this question.

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The objection that the claimant proceeded in her suit, and that the verdict and judgment were taken after the petition in bankruptcy was filed, without the leave of the bankruptcy Court, cannot be maintained. The language of the Act is, "that no creditor, *whose debt is provable* under this Act, shall be allowed to prosecute to final judgment any suit, at law or in equity, therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall be stayed, &c.;" but it does not apply to this case, for the reason that the debt of the claimant was not provable until final judgment was obtained.

JUNE, 1872.

IN THE MATTER OF THE WESTERN INSURANCE COMPANY, A BANKRUPT.

PREMIUM NOTE.—INSOLVENCY OF INSURER.—RETURN OF PREMIUM.

An insurance company, which had issued a policy, and received the promissory note of the assured for the premium, dated April 1, 1871, became insolvent on October 9, 1871. The note passed into the hands of the assignee in bankruptcy. On the 13th of October, 1871, the assured surrendered the policy. After the note became due, they petitioned for an order directing the assignee to receive, in full of the note, an amount proportionate to the time the note had run before the surrender of the policy.

Held, That the petitioners were not entitled to any return of premium, or to any deduction from their note.

HALL, J. Daniel D. Harnett, Joseph Kimball, and Joseph Waltman, at the time of the great fire in Chicago, on the 9th of October, 1871, held a marine policy issued by the bankrupt, and dated April 1, 1871, by which they

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were insured to the amount of \$4,500 against loss or damage to the bark J. S. Austin, by reason of certain enumerated perils. The bankrupt then held, and the assignee in this case now holds, the promissory note of the assured, given for the premium upon said policy, and the assignee has demanded payment of such note. The assured have refused payment, and have now presented their petition, in which they allege and insist, that, by reason of the insolvency of the bankrupt, caused by such fire in Chicago, and its consequent inability to fulfill its contract of insurance, there was a partial failure of the consideration of said promissory note; for the reason that said policy did not, by its terms, expire until the 5th day of December, 1871, and was surrendered by them on the 13th day of October of that year, in consequence of such insolvency, and of their inability otherwise to effect any further insurance upon their vessel; and they, therefore, pray that the assignee in this case may be directed to receive, in full of such premium note, such proportion of the amount thereof, as the time said policy had run before its surrender bears to the whole time the said vessel was thereby insured. The facts are not controverted, and the petition is, in substance, an application for a return of a portion of the premium, as unearned.

There is no ground upon which this petition can be maintained. The petitioners are not, in my judgment, legally entitled to any return of premium, or to any deduction from their note given therefor. The risk had commenced, and the policy had been operative for several months before its surrender, and no case has been cited in which there has been an adjudication that the assured were entitled to a *pro rata* return of premium under similar circumstances.

It was insisted, on behalf of the petitioners, that, upon the surrender of the policy, there was an implied contract to repay the unearned portion of the premium, but no authority was cited in support of the position so

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assumed, and no reason was stated which should take the case out of the general rule that there is to be no return of premium, except under express agreement, in any case where the policy has attached, and the risk has commenced. See *Hendricks v. Commercial Insurance Company*, 8 *Johns.* 1; *Waters v. Allen*, 5 *Hill*, 421; *Insurance Company v. Roberts*, 4 *Duer*, 141; *Columbias Insurance Company v. Lynch*, 11 *Johns.* 233; *Phillips on Insurance*, chap. 22, sections 1820, 1832. The ordinary time policy of insurance is a contract of indemnity, for the time specified, as a single and indivisible period, during which the character and danger of the risk is subject to frequent change; and the assured has no right, by his own act, after the commencement of the risk, to determine that he will no longer pay the agreed rate of premium on the insurance, and then surrender or cancel his policy, and receive back a portion of the premium as unearned. No such contract to repay any portion of the premium received is implied, under the circumstances stated in the petition.

It was also insisted, that the consideration of the note had partially failed, by reason of the insolvency of the insurance company, and the subsequent surrender of the policy; and that this was a partial defence to the premium note; but their counsel failed to cite any authority, and I am unable to discern any acknowledged principle of law or equity jurisprudence to sustain the point thus made. If the petitioners had become insolvent, in consequence of the Chicago fire, and the insurance company had remained solvent, and had surrendered their note to the petitioners, because it was deemed for the interest of the company to do so,—either in reference to some business arrangement with other parties, or because they thought an attempt to collect it would require a useless and unwise expenditure,—it would hardly be contended that the company was not liable for a subsequent loss, unless there was some express

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provision in the policy upon which such a claim could be based.

In every view which I have been able to take of the case, the petitioners are liable for the full amount of their promissory note, and their petition is, therefore, dismissed, with costs.

Southern District of New York.

JULY, 1872.

THE SCHOONER DEFIANCE.

BILL OF LADING.—FREIGHT ON PINE WOOD.—"NORFOLK INSPECTION."

A vessel took on board at Norfolk, Va., a quantity of pine wood, and her master signed a bill of lading, which described the wood as being "112½ cords pine wood, Norfolk inspection," and agreed for its delivery at New York on payment of freight "at four dollars per cord." The vessel arrived in New York, where the consignee refused to pay \$450 for the freight, but insisted that the cargo should be discharged and measured, and that freight should be paid only at the rate of \$4 per cord on such measurement. The wood was then discharged by the vessel, and deposited in a proper wood-yard, of which the consignee had knowledge. He filed a libel against the vessel to recover the value of the wood, alleging that the master had sold it and converted it to his own use:

Held, That, on the bill of lading, the vessel was entitled to receive the \$450 as freight;

That she delivered all the wood she took on board at Norfolk;

That it was not made to appear by the libellant that the master had sold and converted the cargo, and that the libel must be dismissed;

BLATCHFORD, J. On the 14th of August, 1868, the master of the schooner Defiance, at Norfolk, Virginia, took on board of that vessel a quantity of pine

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wood, under a bill of lading given by him, which described it as "112½ cords pine wood, Norfolk inspection," and stated that it was to be delivered to the libellant, Samuel Kimmelstiel, at New York, on payment of freight at "four dollars per cord." The libel avers that the libellant, after the vessel arrived at New York, demanded the delivery of the wood to him, and tendered and offered to pay to the master freight on all the wood on board, according to the bill of lading, but the master refused to deliver any part of it, and, on the contrary, sold it at private sale, without notice to the libellant, and converted it to the use of the vessel. The libel claims the value of the wood at \$9 per cord, less the freight. The answer denies that the libellant tendered or offered to pay to the master freight upon the wood on board according to the bill of lading, or that the master refused to deliver it or any part of it, or sold it or converted it to the use of the vessel. It alleges that the master duly notified the libellant of the arrival of the vessel with the wood on board, and duly tendered and offered to deliver the wood to him on payment of the freight, as provided by the bill of lading, and demanded payment of said freight, but the libellant refused to pay the same or to receive the wood on and by payment of the freight provided in the bill of lading; that thereupon the master discharged the wood from the vessel at New York at a suitable place, with notice to the libellant; and that the libellant afterwards got the wood without paying freight.

The evidence shows that the vessel brought to New York, and discharged, all the wood which she took on board at Norfolk. The contest between the libellant and the master was as to the amount of freight to be paid. The master claimed that, if he delivered all the wood he took on board, he was entitled to be paid \$450 as the freight. The libellant refused to pay that amount, even though all the wood should be delivered to him, and insisted on having the wood landed and then measured by

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the cord, and on paying freight at the rate of \$4 per cord on what the wood should thus measure. Such was not the contract of the parties. The agreement of the bill of lading was, that the wood put on board of the vessel should be called 112½ cords, and should pay freight at \$4 for each of such cords. The contract was the same in legal effect as if the gross sum of \$450 had been named as the freight. The bill of lading is satisfied by delivering all the wood taken on board. It is shown that the wood parts with its bark, by being handled, in being loaded and discharged. The vessel is entitled to be paid for transporting the wood as put on board, and not as it may measure after being discharged at the port of delivery. The libellant, therefore, when he brought the suit, had no cause of action against the vessel, founded on the refusal of the master to deliver any part of the wood unless he should be paid \$450 freight on delivery of all he had taken on board.

The wood having been tendered to the libellant, and he having refused to pay the proper freight on it, it was discharged by the vessel and deposited in a suitable wood-yard. The libellant had immediate knowledge of such place of deposit. The circumstances of the case, as shown in evidence, prove acquiescence by the libellant in such deposit of the wood. Knowing where it was, and that the person who had it in custody had no title to it, he suffered it to remain with him and to be treated by him as his own property. The allegation that the master sold the wood and converted it to the use of the vessel, is one which must be satisfactorily established affirmatively by the libellant. It is not so established. It rests on the testimony of a single witness, and that is the testimony of the person with whom the wood was deposited, and who says that he bought the wood from the master. I cannot credit his story, and it is contradicted by the master. If I credit it, I must convict the master of felony, and the alleged purchaser of fraud, for

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the latter knew, from the circumstances of the case, that the wood did not and could not belong to the master.

The libel is dismissed, with costs.

W. R. Beebe, for the libellant.

J. H. Choate, for the claimant.

JULY, 1872.

IN THE MATTER OF EDWARD D. PRATT,
ALLEGED TO BE AN INVOLUNTARY BANK-
RUPT.

NON-PAYMENT OF COMMERCIAL PAPER.—INJUNCTION.

A petition in involuntary bankruptcy having been filed against P., an injunction was issued, which was served on him on December 6th or 7th, 1871, restraining him from making any disposition or transfer of his property. A subsequent petition was filed against him, the only act of bankruptcy alleged being the non-payment, for fourteen days, of a promissory note, which matured November 29th, 1871:

Held, That, as the injunction on the first petition was in force when the second was filed, the debtor could not be said to have stopped or suspended, and not resumed payment, for fourteen days, of the note in question.

BLATCHFORD, J. The only act of bankruptcy alleged in the petition in this case is the non-payment for fourteen days of a promissory note, which matured November 29th, 1871. But it is shown in defence, that, on a petition in involuntary bankruptcy, filed against the debtor by another creditor, on the 5th of December, 1871, in this Court, an injunction was issued, which was served on the debtor on the 6th or 7th of December, restraining him from making any transfer or disposition of his property. Under these circumstances, he could not apply

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any of such property to the payment of the note in question. The injunction continued to be in force when the petition in the present matter was filed. Consequently, the debtor cannot properly be regarded as having, prior to the filing of such petition, stopped or suspended and not resumed payment, for a period of fourteen days, of the note in question. The petition is dismissed, with costs.

David Crawford, for the petitioner.

G. A. Seizas and *W. A. Coursen*, for the debtor.

Eastern District of New York.

JULY, 1872.

THE BRIG ANNA, HER CARGO AND FREIGHT.

SALVAGE. — DERELICT. — APPORTIONMENT OF SALVAGE. — SPECIAL AGREEMENT OF MASTER.

The brig A. came into collision with another vessel, about 50 miles from Sandy Hook, at night, in a thick fog, when it was blowing hard. She received injuries, which led her master and crew to think she was about to sink, and they left her and got on board the other vessel. The next morning, about 7 A. M., the fog cleared off, and the master of the A. saw her about eleven miles off, but made no effort to return to her. The bark W. S., bound to New York, came to the A., and put on board of her a mate and one man, who got sail on her, and proceeded towards New York, taking a pilot about 10 A. M., and a tug about 11 A. M., which for the agreed sum of \$600, towed the A. to New York, reaching the dock about 9 P. M. The A. was worth \$3,500, her freight amounted to \$1,500, and her cargo was worth \$25,589, making in all \$30,589. The master of the W. S. was sailing her under an agreement with her owners, to make this voyage on shares, he to navigate her, victual and man her, and pay half her port charges, and to receive half the earnings:

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Held, That, whether this was strictly a case of derelict or not, it was the case of a vessel abandoned at sea, where no evidence was given of an intention on the part of her master to return to her, and the awards, which have been given in cases of derelict, might well be looked to, as affording some guide to the judgment ;

That \$6,000 was a proper sum to be awarded as salvage, from which should be deducted the \$600 paid to the tug by the claimants ;

That the master, by reason of the agreement between him and the owners, should receive \$500 more than otherwise would have been his share, and that the award be apportioned as follows :

To the Master of the W. S.....	\$2,800
“ “ Owners “ “ “ “	1,800
“ “ Mate “ “ “ “	800
“ “ Seaman who went with him.....	200
“ “ 3 “ “ staid on the W. S., in proportion to their wages.*.....	800

BENEDICT, J. This is an action on behalf of the master and owners and crew of the bark Wylie Smith, to recover salvage of the brig Anna, and her cargo.

It appears that on the night of the 9th of April, 1872, the brig Anna came into collision with the bark Narragansett, off the Woodlands, in a thick fog and blowing hard. The master of the Anna, who was her owner, says the collision was a violent one, and shook her from stem to stern, and the blow was so violent, that she leaked all over her house and deck. On the supposition that she would sink forthwith, all hands on board of her at once abandoned her and made for the bark, which they reached in safety. The wind had been blowing hard for about three hours before the collision, and continued to blow during the night with a heavy sea on. About four o'clock A. M. the wind went to the westward and moderated. The fog cleared off at about 7 A. M., when the Anna was discovered in sight of the Narragansett, about eleven miles off. The evidence fails to show that the owner of the Anna had any intention or desire to return to his vessel. No attempt was made to do so. About

* This decision was affirmed by the Circuit Court on appeal.

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the same hour the Wylie Smith discovered the Anna abandoned ; and, proceeding to her, placed on board of her a mate and a man, who undertook to get her into New York. The bulwarks were found broken on the star-board side from the main rigging forward, the jib boom broken and hanging across her bow, and the bowsprit split, and fourteen inches of water in her. She was not seriously injured, and could without difficulty sail to New York if properly manned. She was then about thirty miles southeast of the Highlands, with no land in sight but several vessels to be seen a long distance off at sea. The mate of the Wylie Smith got sail upon the brig, and proceeded towards New York, with the wind southwest but hauling to the westward, the Wylie Smith herself having proceeded on her voyage to New York. About 10 A. M. a pilot boarded the Anna, and about 11 A. M. a tug, cruising for business, approached, with whom a bargain was made by the salvors to tow them to New York for six hundred dollars.

They reached the dock in New York about 9 o'clock P. M.

The value of the brig was \$3,500, the freight amounted to about \$1,500, and the cargo is valued at \$25,589.

It is necessary only to allude here to the considerations which govern in awarding salvage. The amount is to be determined upon the consideration of all the circumstances, having reference not only to the labor and risk on the part of the salvors, and the advantage to the owners of the property saved, but also to the interests of commerce. In cases of derelict, one reason for a liberal award is stated to be that the property having been abandoned as lost, it does not lie in the mouth of its owner to complain of the reward paid to strangers, who return his property to him. And this consideration has been adverted to as having equal force whether the vessel abandoned is in a sound or wrecked condition. The rule of the Ordinance was applied to a sound vessel

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abandoned when pursued by pirates, and subsequently found derelict (The Saint Jean Baptiste, 2 *Giroud & Clairon Rep.* p. 375).

Another consideration of force in this case arises out of that public interest, the protection of which lies at the foundation of the law of salvage. This brig was abandoned in near proximity to the entrance of a great sea-port, and in the track of vessels of every description inward and outward bound. Being left floating, with some sails still up, and with no one on board to set her lights, to keep her on her course, or to answer or give hails, she was a very dangerous thing. The presence of such an object in this locality at any time, if known, would justly cause alarm, and might well occasion great loss of life as well as of property. For the taking in charge and saving of a wreck so situated, the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk and the deviation by any vessel from any voyage in order to supply the wreck with a crew, and make her presence safe.

If, in this case, one of the ocean bound steamers had fallen in with the Anna, and turned about to tow her to a place of safety, I should not have hesitated to award liberal compensation for the detention, expense, and importance of such services, without much reference to the amount of the property absorbed thereby. But these claimants were so fortunate as to have this service (which some vessel must have rendered, if their property was ever to be restored) performed by a sailing vessel which was not required to deviate from her course, or to lose any considerable amount of time; and which, while she parted with her chief mate and a man, thereby increasing her own risk, did not sustain any loss. It is therefore possible to give her a liberal reward without absorbing the half or one-third part even of the property saved.

But it has been contended that this is a case of dere-

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lict, and in such cases one-third is always to be given. The law is otherwise (*Post v. Jones*, 10 *Howard*, 161). Whether therefore this be a case of strict derelict or not is of no importance; it is certainly the case of a salvage of a vessel abandoned at sea, where no evidence is produced of an intention on the part of her master to return to her. The awards which are made in the cases held strictly derelict, may therefore well be looked to as affording some guide to the judgment in this case.

According to the fixed regulations governing maritime Courts, in many parts of the Continent, salvage never exceeds one-third of the value saved, with the exception that it may be increased to one-half, when the salvage is accomplished with unusual exertions, and the value of the property is small (*German Mercantile Law*, 748). In France the Code de Commerce is silent upon the subject, and the Ordinance of 1681 still governs and furnishes the rule there applied, according to which, following the Roman law, one-third is awarded whenever property is found abandoned in open sea, or has been raised from its bottom. The Rhodian law distinguished between these two cases, giving one-fifth when the property was found abandoned but floating, and when property was raised from the bottom one-half to one-third, according to the depth of the water, thus recognizing that in cases of derelict, as well as others, the amount of labor expended should be taken into account. In modern cases the amount varies. In the great majority of instances the award approaches nearly to one-third. In a late case of a derelict saved without much labor, time, or risk, two-fifths were given where the value was small (*Georgiana*, 1 *Lowell*, 93).

In the case of the *Viscega* (*Shipping Gazette*, April 30th, 1859), where a derelict, valued at £1,450, was conducted into a harbor by a steamboat and a lifeboat with seven men, with little labor or loss of time and no danger, the award was £500.

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In the case of the *Majestas* (*Shipping Gazette*, March 31st, 1858), a derelict, found five or six miles from the harbor, and conducted in with no difficulty by a tug in one day, on a value of £16,000, £2,000, or one-eighth, was given to the salvors.

In the light of these rules, and in view of the considerations above adverted to, I consider that the sum of \$6,000 should be awarded as the salvage in this case.

From this sum must be deducted \$600, the amount of the tug's bill settled by the claimants.

The next question in the case arises between the owners of the *Wylie Smith* and her master, respecting the apportionment of the award between them, in view of the fact that the master was not sailing on monthly wages, but had an agreement with the owners to make this voyage on shares—he to navigate the vessel, victual and man her, and pay half the port charges, and to receive half the earnings. As to this agreement, it is to be noted that the master was not made owner *pro hac vice*. His agreement was only for a single voyage, for which the vessel had a charter. His position was more nearly that of a master receiving a definite sum, *i. e.*, half the charter money, for navigating and victualing and manning the vessel during the voyage, than of an owner. It is clear, therefore, that the owners of the *Wylie Smith*, whose vessel was used and put at risk, are entitled to share in the salvage. But it is equally clear that part of the ordinary risk of the owners was, by the agreement between them and the master, shifted to the master. In case of disaster arising from the absence of the mate and seaman, the master would have lost, not only his services for the voyage, but also his advances for the crew, provisions, and port charges. Without undertaking to determine the exact divisions of risk which arose from this agreement, it will be just, because of it, to give master \$500 more than otherwise would have been his share.

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The owners will, therefore, receive \$1,800; the master, \$2,300; the mate, who navigated the *Anna*, \$800; the seaman who went with him, \$200; the remaining \$300 to be divided among the three other men, in proportion to their wages.

For libellants, *Goodrich & Wheeler* and *W. R. Darling*.

For claimants, *Scudder & Carter*.

JULY, 1872.

THE UNITED STATES *v.* STEEN & CWERGIUS'
FACTORY, &c.

FORFEITURE.—DISTILLING SPIRITS.—VINEGAR FACTORY.

Under the 44th section of the internal revenue Act of July 20, 1868 (15 *U. S. Stat. at Large*, p. 142), and the joint resolution of the same date, if a person, having a wash and also a still on his premises, capable of distilling, does there distill fermented liquors, his premises not being an authorized distillery, all the personal property found in the premises is forfeited, notwithstanding that the product of the establishment be not distilled spirits, but vinegar.

BENEDICT, J. By section 44 of the internal revenue Act of July 20, 1868, any person (described by sect. 59) who produces distilled spirits, or who brews or makes mash, wort, or wash fit for distillation or for the production of spirits, or who, by any process of vaporization, separates alcoholic spirits from any fermented substance, or who makes or keeps mash, wort, or wash, and has in his possession a still, not having paid special tax, or given bond, forfeits all the personal property found in the distillery. The joint resolution of July 20, 1868, has no

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effect to authorize the distillation, by any person, of fermented liquor, except in an authorized distillery. And as the uncontradicted evidence showed that the claimant did have a wash and also a still, on his premises, capable of distilling, and did there distill fermented liquors, the same not being an authorized distillery, the property proceeded against became forfeited, notwithstanding the fact that the product of his establishment was not distilled spirits, but only vinegar.

There must, therefore, be judgment on the verdict.

JULY, 1872.

THE BARK MIDAS.

COLLISION IN NEW YORK HARBOR.—VESSEL AT ANCHOR.—ICE.—FOUL ANCHOR.

The brig N., while lying at anchor in the port of New York, was run into by the bark M., which drifted down upon her with the tide in the night. The defence set up by the bark was, that she was forced from her own anchor by an irresistible field of ice brought down on her by the tide. As to the presence of any such field of ice, there was a conflict of evidence; but the evidence showed that the port anchor of the bark had no stock, and that the chain of the starboard anchor was fouled when it was got up on the morning after the collision.

Held, That, on the evidence, the bark had failed to show that the drifting was an inevitable accident.

BENEDICT, J. This is an action to recover of the bark Midas the damages caused by that vessel drifting afoul of the brig Napier, at night, while the latter lay at anchor in this harbor. The defence is that the Midas was carried from her moorings by a large field of ice,

The Bark Midas.

which caused her to drag her anchor. The presence of any such field of ice, as is sworn to by the claimant's witnesses, or of any ice that should cause a vessel to break away, is wholly denied by several witnesses. The occurrence, as described by the claimant's witnesses, appears to my mind somewhat improbable, but, of course, not impossible. The drifting of the vessel may, however, be accounted for by the fact that the chain of the bark had become wound around the stock and fluke of her anchor, so as to render it unable to bite the ground sufficiently to hold her, when the tide ran ebb. It is proved, and not disputed, that her starboard anchor was found in this condition when it came up next morning, and that this would account for her dragging, and it is also proved and not disputed that her port anchor had no stock at all, and was not therefore an anchor calculated to hold when dropped. In the presence of such proofs, as to the condition of the ground tackle of the bark, and of the evidence in the case casting doubt upon the statement that a large field of ice caused the bark to drift, I must hold that the bark has failed to show that the accident was caused by the overwhelming power of ice, which could not be successfully resisted.

There will accordingly be a decree for the libellant, with an order of reference to ascertain the amount.

For libellant, *J. K. Hill.*

For claimant, *Beebe, Donohue & Cooke.*

In the Matter of Simeon Leland and others, Bankrupts.

Southern District of New York.

OCTOBER, 1872.

IN THE MATTER OF SIMEON LELAND AND OTHERS, BANKRUPTS.

NEGOTIABLE INSTRUMENT.—WITNESS.

A bond issued by an individual, under seal, with coupons attached for the payment of the interest semi-annually, payable to bearer, and secured by a mortgage of real estate to trustees, is a negotiable instrument, and not a specialty, so as to be subject, in the hands of an assignee, to equities existing against the assignor. L. had issued a series of such bonds, which, after his bankruptcy, were found in the possession of a certain bank. In a reference, ordered at the instance of the assignee, a witness was under examination, to whom questions were put relating to the original consideration of the bonds. He refused to answer, and an application was made to the Court to compel him to answer:

Held, That, as the bonds in question were negotiable, and the bank appeared to be a *bona fide* holder for value, the original consideration could not be inquired into, and the witness need not answer.

THIS was an application to compel a witness to answer certain questions put to him on a reference ordered at the instance of the assignee in bankruptcy. It appeared that Warren Leland, one of the bankrupts, had, before the bankruptcy, issued five hundred bonds of \$1,000 each, with coupons attached, secured by a mortgage of real estate.

The form of the bonds was as follows:

“ONE THOUSAND DOLLARS BOND OF WARREN LELAND, Secured by real estate at Saratoga Springs, County of Saratoga, State of New York, known as the Union Hotel property, consisting of the Union Hotel and grounds attached thereto, the Leland Opera House, Union Hotel Stores, Union Hotel Cottages, Union Hotel Water Works, Union Hotel Gas Works, Union Hotel Stable, and all the furniture and personal property belonging and appertaining thereto, conveyed for that pur-

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pose to D. Randolph Martin and Edward B. Wesley, by trust mortgage bearing even date herewith, this bond being one of a series of five hundred of like tenor and date.

“Know all men by these presents, that I, Warren Leland, of the city, county, and State of New York, am held and firmly bound unto A. T. Stewart, or bearer, for moneys loaned or advanced to me, in the sum of one thousand dollars, which I do hereby promise and agree to pay at the Ocean National Bank, of the City of New York, on the first day of October, one thousand eight hundred and eighty-five, together with interest thereon at and after the rate of seven per cent. per annum from the day of the date of these presents, on the first days of April and October, in each and every year ensuing the date hereof, until the said principal sum shall be fully paid, upon the presentation of the annexed warrants, as they severally become due, at the Ocean National Bank of the city of New York.

“The payment of this, with four hundred and ninety-nine other bonds of the same amount, is secured by a trust mortgage to D. Randolph Martin and Edward B. Wesley, of certain lands and real estate and personal property at Saratoga Springs, in the county of Saratoga, and State of New York, known as the Union Hotel property, bearing even date herewith.

“In witness whereof, I have hereunto set my hand and seal, and to certify to the number of said bonds, and that they are possessed of the same trust mortgage, the said D. Randolph Martin and Edward B. Wesley have countersigned this bond, this first day of October, one thousand eight hundred and sixty-five.

“WARREN LELAND.

“Sealed, delivered, and counter-[Seal.]
signed in presence of

“JOHN K. HACKETT.

“Countersigned, { D. R. Martin,
 { E. B. Wesley.”

In the Matter of Simeon Leland and others, Bankrupts.

The coupons attached to each bond were forty in number, and were in the following form, excepting the date :

"Warren Leland will pay to the bearer hereof, at the Ocean National Bank of the city of New York, thirty-five dollars on the first day of October, 1885, being interest to that date on Union Hotel Bond, No. 483.

"\$35.

"WARREN LEland."

Certain of these bonds being found in the hands of the Union Square National Bank, to whom they had been pledged, the assignee took proceedings to recover them. A reference to take proofs was ordered. On that reference a witness was under examination, and certain questions were put to him touching the original consideration of the bonds. He refused to answer, and an application was made to the Court to compel him to answer.

T. M. North, for the assignee in bankruptcy.

D. McMahon, for the bank.

BLATCHFORD, J. I think that, on the authority of the decisions of the highest Courts of this State and of the United States, the bonds and coupons in question are negotiable instruments, although issued by an individual, under his seal, and not by a corporation, and are not specialties, so as to make them subject, in the hands of their assignee, to equities existing against their assignor. Although under seal, they were issued, as they show on their face, to secure the payment of money on time, and they contain, on their face, expressions showing that they are expected to pass from one person to another by delivery. Therefore, the attributes of commercial paper attach to them. Their character cannot be controlled or varied by the mere fact that their maker put a seal after his name (*Brainerd v. New York and Harlem R. R. Co.*, 25 N. Y. 496; *White v. Vermont R. R. Co.*, 21 *Howard*, 575; *Mercer Co. v. Hackett*, 1 *Wallace*, 83).

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Such bonds and their coupons pass by delivery, a purchaser of them, in good faith, is unaffected by want of title in their vendor, and the burden of proof, on a question as to such good faith, lies on the party who assails the possession (*Murray v. Lardner*, 2 *Wallace*, 110).

The evidence in this case shows, that the Union Square National Bank became, to all substantial intents, the purchaser of these bonds and coupons, in good faith, for a full and fair consideration, in the usual course of business, and without notice of any possible defect in the title of their assignor.

These views proceed on the assumption that the claim of the bank will absorb all dividends on the bonds and coupons, and they apply only to the interest of the bank therein. If there shall be a surplus beyond paying the claim of the bank, questions as to the title and position of their assignor may become material.

The interrogatories which the witness declined to answer were irrelevant.

OCTOBER, 1872.

THE STEAMTUG W. E. CHENEY.

TUG-BOAT AND TOW.—DELAY IN VOYAGE.—STORM.—BURDEN OF PROOF.

On the 6th of November, 1871, a tug-boat took in tow a barge, at Elizabethport, N. J., to tow her to Brooklyn. She reached Port Johnson, in the Kills, that day, and left the barge there, coming on to New York herself that night. The next morning she took a tow back to Elizabethport, and there took in tow other boats, which she brought to Port Johnson, and there picked up the barge and started on with her. In towing the barge across New York bay, the latter was sunk in consequence of a storm. The tug-boat alleged that she left the

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barge at Port Johnson because the weather was such that it was unsafe to tow her through, and that the storm by which she was sunk, on the 7th, was an unexpected squall:

Held, That the tug was bound to have towed the barge from Elizabethport to Brooklyn, without leaving her at Port Johnson, unless there was good reason for doing so;

That, if it were shown that there was good reason for having left the barge at Port Johnson, the burden of proof was on the tug to show that there was no time, before she did take the barge in tow again, when she could have proceeded with her so as to have avoided the sudden squall;

That she had not shown this, and was liable for the loss of the barge and her cargo.

BLATCHFORD, J. These are two libels filed to recover, the first one the value of the barge Col. J. A. Mulligan, and the second one the value of a cargo of coal on board of her. The barge and her cargo were sunk and lost, while in tow of the steamtug W. E. Cheney, in the harbor of New York, in the vicinity of Robbins' Reef buoy, on the 7th of November, 1871, in the day time. The answers admit the making of an agreement, on the 6th of November, by the tug, to tow the barge, then having the coal on board, from Elizabethport, New Jersey, to Brooklyn. The answer in the first case alleges, that the cargo of the barge, 201 tons, was more than her usual and ordinary cargo. The answer in the second case alleges, that such quantity was more than the barge was able to carry. The barge was taken in tow by the tug, at Elizabethport, on the 6th, and towed as far as Port Johnson, in the Kills, and there left over night, the tug proceeding to New York, and remaining there that night, and going the next morning to Elizabethport, with a tow of empty boats, and thence back to Port Johnson, with loaded boats, and there, on the morning of the 7th, taking in tow the barge and seven other loaded boats, all abreast, four on each side of the tug, the barge being the third boat from the tug, on the starboard side of the tug. On the voyage to New York, the wind was violent and the sea high, and the barge took in water over her bows, so that she sank, with her cargo.

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The libels allege, that the leaving of the barge at Port Johnson, on the 6th, was contrary to the duty of the tug; that, when the tug took the eight boats in tow, on the 7th, at Port Johnson, it was well known that the wind, which was from the northwest, would increase in violence, as the day grew older; that the nine vessels abreast presented a broad and uncontrollable front to the action of the increasing violence of the wind and the roughness of the waves, while a smaller front would have been presented if the tow had been made up in tiers; that, as the tow proceeded, the wind rapidly increased, until it was apparent that it would be dangerous, if not impossible, to cross the waters of the bay with safety to the tow; that, instead of stopping in a place of safety, or turning back, when she might, the tug kept on, with the tow, the wind and the waves constantly increasing; that then the tug carelessly, negligently, and unskillfully, attempted to turn around with the tow, by attempting to tow towards the wind, thus presenting the broadside of the barge to the full action of the wind and the force and roughness of the waves, when the barge filled and sank, with her cargo; and that the loss was occasioned solely by the neglect and want of care and skill of those navigating the tug, and, among other things, in not remaining by the barge, and taking a proper time to cross the bay, in taking other employment, after she had taken the barge in tow and assumed obligations towards her, in not returning to the barge at an early hour, while the weather was calm, in going to Elizabethport and towing other loaded boats, and thus losing time and increasing the risk, in making up a tow which presented nine vessels abreast, in not making up the tow in tiers, in not stopping and returning when she found the wind increasing, in attempting to turn towards the wind, instead of keeping off before the wind, to a place of safety, and in taking in tow so large and improper a number of loaded vessels.

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The answers allege, that the tow was stopped at Port Johnson on the 6th, on account of a severe storm, which rendered it improper to proceed; that the tow of eight boats was not an improper one for the tug and was properly made up; that, when the boats were taken in tow at Port Johnson on the 7th, the weather was fine; that, when the tow arrived outside of Robbins' reef, a sudden and unexpected squall from a northwesterly direction struck the tow and continued for about twenty-five minutes; that it was impossible to stop the tow in that place and the safest way was to proceed on their course; that, by the squall, and by the perils of the sea, or by reason of the overloading of the barge and her being very deep in the water and old and decayed, she was unseaworthy and unable to resist the dangers of the sea; that the water was washed upon her deck and, because her hatches were open, into the hold; that, thereupon, the master of the tug, seeing the danger to the barge and that she would inevitably sink, put his tug and tow around head to the wind, and not off before the wind, and endeavored to run the tow back into the Kills and beach the barge, but the boat, before she could be beached, sank; that the accident occurred by the perils of the sea, and was inevitable, or else through the fault of the persons loading and managing the barge, in that, among other things, she was too deeply laden, that she was an old and unseaworthy boat, that her hatches were left open, and that she was insufficiently manned; that the persons in charge of the tug were not guilty of any negligence, unskillfulness or mismanagement, in the time and manner of towing, or making up the tow, or otherwise; and that the accident was occasioned by the perils of the sea, and was inevitable, or else by the negligence, mismanagement and unskillfulness of the agents of the libellants and the persons managing the barge.

Under the contract of towage admitted by the an-

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swers—one from Elizabethport to Brooklyn—the tug was bound to proceed on the voyage and take the barge to Brooklyn, without leaving her for a time at Port Johnson, unless there was good reason for doing so. The tug claims to have shown good reason therefor, because of the violence of the wind and sea on the afternoon of the 6th. Assuming good cause to have been shown for leaving the barge at Port Johnson for a time, the disaster having happened, the burden of proof is on the tug to show that there was no time prior to the time when, on the 7th, she resumed the trip with the barge, that she could have taken the barge in tow and transported her safely to Brooklyn from Port Johnson, and thus have avoided the alleged sudden squall set up in the answers. The tug fails to show this and does not allege it in her answers. She does not aver or show that she could not have transported the barge safely during the night of the 6th, or that there was any such violence of winds or waves during that night as would have prevented such safe carriage. On the contrary, the evidence on the part of the libellants establishes that the wind went down with the sun on the 6th and that the night was quiet. On this ground alone condemnation of the tug must follow, even assuming that the weather was fair when the vessels left Port Johnson on the 7th, and that the disaster happened as the result of a sudden squall.

No fault on the part of the barge in overloading, or improper loading, or in manning or equipment, is shown. The tug took her in tow as she was, with a full opportunity to see how she was loaded, manned and equipped.

There must be a decree for the libellant in each case, with costs, and a reference to a commissioner to ascertain the damages.

Beebe, Donohue & Cooke, for the libellants.

Goodrich & Wheeler, for the claimant.

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THE UNITED STATES v. HARVEY BARNES.

FORFEITURE.—IMPORT ACTS.—FALSE PAPER.—ENTRY AND INVOICE.

If an importer, on entering goods at the Custom House, takes the oath that the invoice of the goods, "contains a just and faithful account of the actual cost" of the goods, and is "in all respects true," when the cost stated in the invoice is not the actual cost, the oath is a false paper, and the importer knowingly makes the entry by means of a false paper, and the goods or their value are forfeited.

An invoice which states the cost of the goods falsely, is a false invoice, within the meaning of the Act of March 3d, 1863 (12 *U. S. Stat. at Large*, 738), even though the cost is not required to be stated in the invoice because the goods are not subject to *ad valorem* duty.

THIS was an action brought against the defendant, to recover the value of certain sugars imported by him, on the alleged ground that he had made the entry by means of false papers, and thereby had forfeited the value of the goods to the United States. On a trial before a jury a verdict was found in favor of the United States. The defendant made a motion for a new trial.

For the United States, *William Stanley*.

For defendant, *Stephen P. Nash*.

BLATCHFORD, J. The oath taken by the defendant, on making the entry, was, "that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise," and that such invoice is "in all respects true." Evidence was given on the trial, to show that the invoice did not contain a just and faithful account of the actual cost of the sugars embraced in it, and that the invoice was untrue in respect to the cost of such sugars, and gave

the cost at less than it really was, and was, therefore, not in all respects true. The jury, under the charge given, could not have found a verdict for the United States, unless they were satisfied, from the evidence, affirmatively, that the invoice gave the cost of the sugars as less than it really was. As the defendant, in the oath, stated that the invoice contained the actual cost of the sugars, and as it must be held, on the finding of the jury, that the cost stated in the invoice was less than the actual cost, it follows that, when the defendant swore that the cost stated was the actual cost, he swore to what he did not know, and could not have known, to be true. If he did not know it to be true, his oath was false, and the paper was a false paper. He knowingly made the entry by means of a false paper. The statute (Act of March 3d, 1863, § 1, 12 *U. S. Stat. at Large*, 738), provides, that no goods shall be admitted to entry, unless the owner or consignee, or the agent of one of them, at the time of making the entry, verifies the invoice, by his oath or affirmation certifying that the invoice is in all respects true. The oath is a paper required on making the entry. It is a paper by means of which the entry is made. It is a paper other than the invoice, and other than the certificate of the consul. If not true, the oath is a false paper. If the oath states that the invoice is in all respects true, when the invoice is not in all respects true, the oath is a false paper. If the oath states that the invoice contains a just and faithful account of the actual cost of the goods embraced in it, when such cost is, in fact, stated therein at less than such actual cost, the oath is a false paper. If the owner states, in the oath, that the invoice is in all respects true, when, in fact, the invoice states the cost of the goods embraced in it at less than their actual cost, he states what is not true, and what he does not know and cannot know to be true, and makes such statement knowingly, knowing that he does not know the invoice to be in all respects true, and knowing that he does not

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know that the cost stated in the invoice is the actual cost. He, therefore, knowingly makes the entry by means of a false paper, and under the provision of the statute, the goods or their value are forfeited.

On this view, if, as the jury must have found, under the charge of the Court, and as was shown by the evidence, the cost of the sugars was greater than the cost stated in the invoice, the defendant could, under no circumstances, be entitled to a verdict. Even if the Court erred in the portions of its charge to the jury which are excepted to, and erred in refusing to charge in particulars requested by the defendant, the defendant was not legally harmed or prejudiced by any such error (*Barth v. Clise, Sheriff, 12 Wallace, 401*).

I do not mean, however, to concede that there was any such error, or that an invoice stating the cost of the goods embraced in it at less than their actual cost is not "a false invoice" within the meaning of the Act of 1863, even though the cost was not required to be stated in the invoice because the goods were not subject to *ad valorem* duty.

I see no error in the remark of the Court to the jury, that the course of the Government in not seizing the sugars after they had passed into the hands of *bona fide* purchasers, and in resorting to a suit to recover their value, was proper and just action, under the law and the circumstances of this case.

Nor do I see any error in the charge of the Court, to the effect that, in view of the state of the evidence, as given by the Government, in regard to the quality and value, and what must have been the cost, of the sugars in Demerara at the date of the invoice, it was incumbent on the defendant to produce evidence from Demerara as to such cost, and that the fact that he did not produce such evidence was in itself negative evidence, as strong as affirmative evidence on the part of the Government, that the cost was below the invoice.

The observations made by the Court as to the power of the Secretary of the Treasury to remit forfeitures, appear, by the bill of exceptions, to have been made, as stated at the time by the Court, in view of remarks that had been made by the counsel for the defendant. It must be assumed, from the record, that those remarks were made in the hearing of the jury, and that they were such as to justify the observations of the Court. If it were not so, the record should show it.

In the view first above stated, as to the effect of the oath of the defendant as to the absolute truth of the invoice, all consideration of the question as to knowledge by the defendant, at the time he made the entry, that the invoice was false in respect to prices, and that the cost of the sugars was greater than that stated in the invoice, was and is unimportant. It was sufficient that he swore that the invoice was true, when it was not true, and he did not know, and could not have known, that it was true. The statute makes such absolute affirmative oath of verity, to be made by the owner or the consignee, or the agent of one of them, a condition precedent to the admission of the goods to entry, and whoever makes such oath must be held to it, and if he swears that the invoice is true, when it is not true, he must abide the consequences. The fifth count of the declaration is founded on the oath, and avers, that the defendant, as owner, consignee, or agent of the goods, made an entry of them by means of a false and fraudulent practice or appliance, in that he swore, in the oath which he made, that the invoice presented contained a just and faithful account of the actual cost of the goods, whereas, in fact, the invoice did not contain a just and faithful account of the actual cost of the goods, but, on the contrary, contained a false account thereof, and that such oath was made with the intent on the part of the defendant to defraud the Government of some part of the duties justly and legally due on the goods. This count

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is sufficient to sustain the verdict, on the facts. The allegation that the false oath was made by the defendant with intent to defraud the Government, is equivalent to the allegation that the defendant "knowingly" made the entry by means of a false oath, as a false and fraudulent practice. Such intent, in regard to the false oath, necessarily imports that there was knowledge that the oath was false.

There are, in the record, two exceptions to the admission of evidence, but neither of them was urged on the motion for a new trial, and I perceive no error in admitting the evidence excepted to.

The views above stated cover all the exceptions urged on the motion for a new trial. If any legally prejudicial error was committed by the Court at the trial, it was one of which the Government had a right to complain, as the facts warranted a charge such as is hereinbefore indicated, and which would have been one on which the defendant never could properly have been entitled to a verdict, and on which no other verdict could properly have been given than one in favor of the United States.

The motion for a new trial is denied.

OCTOBER, 1872.

IN THE MATTER OF W. FLEMING SMITH, A
BANKRUPT.

STRIKING OUT PROOF OF CLAIM.—UNLIQUIDATED DAMAGES.

A claim by a broker, who had made contracts as the agent of the bankrupt, but in his own name, for the purchase of goods, which contracts the bankrupt refused to carry out, whereupon the broker settled them at a loss, to recover

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against the bankrupt the amount of such losses and of his brokerage, is a claim for unliquidated damages, and the proof of it, as a claim against the bankrupt's estate, is to be disallowed.

THE register, in this matter, certified to the Court, that the assignee had requested him to re-examine and to disallow a claim of one Jones, the proof of which had been filed with the register, on the ground that it was a claim for unliquidated damages, and that, in obedience to his order, the parties had appeared before him in the matter, and that the proof of claim stated a claim of \$3,246 28, for and on account of moneys paid by Jones to various persons, and for interest and services, as set out in an account attached; that Jones, as broker, purchased the goods mentioned in the account, at Cincinnati, by the direction and for the account of the bankrupt, to be delivered to him, at Cincinnati, at the times therein mentioned; that the bankrupt failed to accept or receive the goods pursuant to the contracts of purchase made by Jones for him, by reason whereof the losses mentioned in the account occurred; that Jones thereupon settled and closed said several contracts of purchase, and disposed of the subject-matter thereof, and paid and suffered said several items of loss mentioned in the account, for and on account of the bankrupt, amounting to said sum of \$3,246 28. The register certified that the only question was whether this was a claim for unliquidated damages, and that, if it was, it should be expunged.

BLATCHFORD, J. The claim, as proved, must be disallowed and expunged.

The Propeller Electra.

OCTOBER, 1872.

THE PROPELLER ELECTRA.

COLLISION IN HELL GATE.—STEAMER AND SCHOONER.—SUDDEN ANCHORING IN CHANNEL.

A propeller, bound to New York, was coming through Hell Gate, with an ebb tide, in the day time. A schooner which was going through ahead of her came to anchor off Hallett's Point, and was struck by the propeller and sunk. The schooner alleged that the wind had died away, and that, finding she was in danger of drifting on Hallett's Point, she came to anchor, and had been at anchor several minutes before the propeller came in sight, and that the propeller could have avoided her by going on either side. The propeller claimed, that the schooner was slowly crossing the channel towards Ward's Island, when the propeller came to Negro Point, and that she there took her course to go under the schooner's stern, and between her and Hallett's Point, and that, when she was within five or six hundred feet of the schooner, the latter suddenly came to anchor in midchannel, right ahead of the propeller, and when it was too late for the propeller to avoid her:

Held, That the weight of the evidence sustained the defence of the propeller ;
 That, even if the schooner was in peril of going on the rocks, by reason of the dying away of the wind, which led her to anchor when she did, she voluntarily threw upon herself the greater danger of anchoring in a narrow and dangerous tide-way, in the course of the propeller coming with the tide ;
 That the anchoring of the schooner took place at a time and in a position when and where the propeller, discovering the fact as soon as she ought to have discovered it, could not avoid the schooner, and that the propeller was not liable for the damages.

BLATCHFORD, J. This libel is brought by the owners of the schooner Lucy O. Hall, to recover for the damages sustained by them in consequence of injuries to the schooner, through a collision which took place between her and the steam propeller Electra, on the 15th of March, 1871, at about half past seven o'clock, A. M., the schooner being at the time at anchor in Hell Gate, between Hallett's Point and Negro Point, and the propeller being on a trip from Providence to New York, and the

The Propeller *Electra*.

tide being a strong ebb and with the course of the propeller.

The libel alleges, that the schooner was passing through Hell Gate, on her way to New York from the Sound, with a moderate breeze from the eastward; that, when she reached a point in the channel opposite Negro Point bluff on Ward's Island, the breeze fell off, leaving her at that point in nearly a dead calm, and she drifted with the ebb tide towards Pot Rock eddy, when, finding it impossible to keep in the channel way, by reason of there being at that time no wind and a swift current setting on to Hallett's Point, and getting dangerously near to Hallett's Point, and being too near to clear it, and being entirely at the mercy of the tide and current by reason of the falling off of the wind, and having swung around about head to the northward, she let go her anchor, to avoid going upon the rocks, and paid out about fifteen fathoms of chain; that the anchor took at once, and brought her up head to the tide and clear of the rocks, and about 150 feet to the eastward of Hallett's Point, in a proper and safe place, under the circumstances, to anchor, being about 1,000 feet from the easterly shore of Hell Gate, or Holmes' rock, or the Hog's back; that, on the schooner's coming to anchor, the propeller was just passing Negro Point bluff, on her way from the eastward, being about one-third of a mile distant from the schooner; that the propeller, by gross carelessness and negligence on the part of those in charge of her, instead of passing to the northward of the schooner, in the regular and usual course of vessels passing through Hell Gate, came directly down upon the schooner, as she lay at anchor, and attempted to pass in the narrow space between the schooner and Hallett's Point reef; that, as soon as it was evident that she intended to go southward of the schooner instead of northward, the master of the schooner attempted to avoid being run down, by putting his helm hard a-starboard, so as to give the schooner a

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sheer to port ; that the starboard bow of the propeller struck the bowsprit of the schooner, and broke it off, and carried away her foremast and rigging, and did other damage, and parted the schooner's cable, and the propeller sailed on, leaving the schooner to drift ; and that the collision was caused wholly by negligence on the part of the propeller.

The answer sets up, that the wind was about east southeast ; that the schooner was going through Hell Gate ahead of the propeller, and, after having passed Negro Point, tacked to the northward, and was standing across the river towards Ward's Island, in such a direction, and with such speed, as made it proper for the propeller to pass under her stern ; that, accordingly, the course of the propeller was so shaped as to pass under the stern of the schooner, and she would have passed the schooner, had not the schooner, when in the true tide, and without any cause or excuse, cast her anchor overboard, and swung around to her anchor right in the channel, and in the way where the propeller must be swept against her by the tide ; that, as soon as the fact that the schooner had dropped her anchor could be discovered from the propeller, it was discovered, and immediately her helm was put hard a-starboard, to endeavor to swing her away from the schooner, but it could not be done and the side of the propeller was carried by the tide against the bows of the schooner ; that the propeller was only about 300 or 400 feet from the schooner when the latter came to anchor, and was then heading to the southward of her, so as to pass between her and Hallett's Point, and it was not possible to pass on the north side of the schooner, and the propeller's only course was to keep on in the course she had taken, which was a regular and usual course of vessels in passing through Hell Gate ; that the collision was caused by no negligence on the part of the propeller, and the accident was, so far as she was concerned, inevitable ; and

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that the schooner was in fault in coming to anchor as she did in midchannel, and is solely responsible for the collision.

The schooner had three persons on her at the time of the collision. They were her master, a mate, and a man who acted as hand and steward. All three of them have been examined as witnesses for the libellants, and they are the only witnesses for the libellants who saw the collision, except a person named Buskin, who says he was at the time on another schooner bound from the eastward. On the part of the propeller six persons who saw the collision have been examined as witnesses. They are Mott, her master, Reynolds, her bow watchman, Shirley, her pilot, Griffin, her second pilot, Howell, wheelsman, and Kelly, a passenger. Mott, Shirley, Griffin and Howell were in the pilot house, attending to their duties, from the time the schooner came into view from the propeller, and Reynolds was on the bow.

The contested point in the suit is, as to whether the anchoring of the schooner was or ought to have been observed from on board of the propeller, soon enough for her to have been able to avoid the collision. On the part of the schooner, it is contended, that she was at anchor in a position visible to the propeller, for a sufficient length of time prior to the collision for the propeller to have taken a course to the northward of her, free and clear. On the part of the propeller, it is contended, that, as the propeller came around Negro Point bluff, the schooner was seen ahead, in motion, heading over towards the Ward's Island side, on the star-board hand, below Negro Point, and about in a range between the propeller and Hallett's Point; that the propeller went on to Negro Point, and when off that, and in the usual place for determining what course to take and what channel to go through, whether the one between Flood Rock and Hallett's Point, or the main ship channel around by Manhattan Island, and when a gap was

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opening between the stern of the schooner and Hallett's Point, as the schooner moved onward, heading towards the Ward's Island side, the pilot of the propeller determined to take that course which was the safer and more usual one for a steamer as large as the Electra, when coming from the eastward, on an ebb tide, namely, to go through the channel between Flood Rock and Hallett's Point; that, accordingly, when the propeller was off Negro Point, her helm was changed, by porting, some six points, and she headed for Hallett's Point, having the schooner a point and a half on her starboard bow, after having got headed for Hallett's Point; that the schooner then suddenly, when the propeller was only 600 or 700 feet off from her, let go her anchor and swung to the tide; that the propeller was then so near to her that it was impossible for the propeller, by porting, to pass to the northward of her, or, by starboarding, to clear her to the southward; that the propeller could not, in the rapid tide and dangerous navigation of Hell Gate, and in the sudden emergency thrown upon her by the anchoring of the schooner, and in her close proximity to the schooner when the latter so anchored, effect any useful result by slowing, stopping or backing; that, the moment it was seen, from the propeller, that the schooner was anchoring, the wheel of the propeller was hove to starboard, and an effort made to sheer her head to port and clear the schooner to the southward, which was ineffectual; and that the collision was, so far as the propeller was concerned, inevitable.

I think this defence is established. The weight of the evidence sustains it. Without regard to the question whether there was any wind, or more or less wind, at the time the schooner anchored, or the question whether the falling off in the wind, or the absence of wind, brought her into peril, or induced a reasonable apprehension of peril, which caused her to anchor, or the question whether she was, in fact, in danger of drifting

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on shore, so as to make it proper for her to anchor where she did, the weight of the evidence is, that, to those on the propeller, faithfully observant of their duties, the schooner seemed to be going with the tide, and to be afloat, making more or less headway through Hell Gate, ahead of the propeller, and to be in such a position as to justify them in assuming that she would continue to move on with the tide; that, if she had done so and not come to anchor as and where she did, there would have been abundant room for the propeller to go between her and Hallett's Point; that the propeller, at the usual place for selecting her course, selected it, and made a proper selection, in view of the appearance then presented to her by the schooner; and that, after the propeller had got on her course heading for Hallett's Point, and at a time when it was too late, and the vessels were too near to each other for the propeller to go to the northward, or to go any further to the southward, or to effect any useful object by slowing, stopping or backing, the schooner suddenly cast anchor directly in the path of the propeller, and brought upon herself the consequences which ensued. It may have been that the schooner was in peril, and was right in anchoring where she did, but she must abide the consequences of anchoring there when she did. Intent on avoiding what she conceived to be danger of going on shore, she voluntarily threw herself into the greater danger of suddenly anchoring in the dangerous and narrow tide-way of Hell Gate, in front of and directly in the course of a large steamer coming with the tide. If the schooner, when she determined to anchor, saw the propeller approaching, she took the risk of the unusual circumstance of a vessel's anchoring in that spot being discovered by the propeller soon enough for the propeller to avoid her. If the schooner, when she determined to anchor, did not see the propeller approaching, it makes no difference. The only question is, whether the anchoring of the

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schooner took place at a time and in a position when and where the propeller, discovering the fact as soon as she ought to have discovered it, could not avoid the collision. This point I must, on the evidence, resolve in favor of the propeller and against the schooner.

The libel is dismissed, with costs.

D. A. Hawkins, for the libellants.

R. D. Benedict, for the claimants.

OCTOBER, 1872.

THE BRIG WILEY SMITH.

BILL OF LADING.—SALE OF CARGO.—GENERAL AVERAGE.

The master of a vessel, which had been driven ashore by a peril of the sea, and got off, being unable to raise money to pay the salvage claims, sold a portion of the cargo for that purpose:

Held, That the vessel was not liable for non-delivery of such cargo, under the bill of lading;

But that, as the owners of the vessel offered to pay the amount of their contribution in general average, the holders of the bill of lading might recover such amount in this action, on the bill of lading.

THIS was an action by the consignees of a quantity of satin wood and mahogany, to recover for the failure of the brig to deliver part of it, in accordance with the bill of lading which she had given therefor. The owners of the brig set up, that, after the cargo was received on board, the brig was driven ashore by a peril of the sea, and was got off again, but, in doing so, part of the cargo in question was lost, and the vessel and cargo became liable for salvage, which the master was unable to pay, and, being unable to raise it on bot-

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tomry, he was compelled to sell the rest of the cargo in question, and that the vessel was, therefore, not liable for the non-delivery of the cargo; and they offered to pay to the libellants their contribution in general average.

T. Scudder, for the libellants.

W. W. Goodrich, for the claimants.

BLATCHFORD, J. The evidence satisfactorily shows, that the vessel was driven ashore by a peril of the sea, within the exception in the bill of lading, and that, in taking the measures he did to save vessel and cargo, including the throwing overboard of such cargo as was lost thereby, and in selling what was saved from the cargo, the master acted in good faith, and under a sufficient necessity, for the best interests of all concerned, and with reasonable discretion. The libellants must, therefore, fail in their claim on the bill of lading, but they are entitled to avail themselves of the offer in the answer, made by the claimants, to pay their contribution in general average.

OCTOBER, 1872.

IN THE MATTER OF THEODORE E. BALDWIN
AND EDWARD W. BURR, BANKRUPTS.

CONTRACTING.—PROOF OF DEBT.

On the petition of a creditor, showing that he and the assignee objected to the claim of B., another creditor, an order was made referring it to a referee to examine into the facts. Before any evidence was taken before the referee, the assignee appeared before the referee and objected to the proceedings, on the

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ground that, since the assignee was elected, B. had made proof of his claim in form satisfactory to the register, and that the proof had been delivered to the assignee, and registered by him, and that, since the election of the assignee, the petitioning creditor had not renewed his objection, and the assignee had never objected to the claim. B., however, insisted upon proceeding with the reference :

Held, That the reference should not have been proceeded with, and that the order of reference should be vacated, leaving the parties to pay their own costs and expenses.

BLATCHFORD, J. However proper the order of reference of the 10th of February, 1872, may have been, on the assumption, that, *prima facie*, from the facts set forth in the petition on which it was made, the petitioning creditor and the assignee objected to the claim of Brewster, yet, when, before any testimony had been taken under the order of reference, the assignee appeared before the referee and objected to all proceedings under the order, on the ground that, since the assignee was elected, Brewster had made proof of his claim in form satisfactory to the register, who had received the same, and that the proof had been delivered to the assignee, and duly registered by him, and that, since the assignee was elected, the petitioning creditor had not renewed his objection to the proof of such claim, and no other creditor had made any objection to it, and that the assignee had never made any objection thereto, the reference should not have been proceeded with on the part of Brewster. There was no occasion for proceeding with it. The expense of proceeding with it was needlessly incurred. Nothing done in the course of it, after that, could bind the assignee. He did not afterwards appear on the reference, or produce any witnesses, or cross-examine any of the witnesses produced by Brewster. The original order of reference was granted *ex parte*, without due notice to the assignee, and only authorized the referee to take, on due notice to the proper parties, proof of the claim of Brewster, and such proof as might be offered in opposition thereto. When, in re-

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sponse to a notice, the assignee then appeared, and made the objection he did, in the terms above stated, the reference ceased to be one to which the assignee and the creditors generally of the estate, represented by him, could be considered as parties, so as to bind him and them as parties, or make him or them responsible for any expenses of the reference, if the assignee thereafter took no part in the proceedings. On such objection being made by the assignee, Brewster ought to have brought the matter before the Court for instructions. Not having done so, he took the risk of going on. The entire aspect of the case, as it stood when the order of reference was made, on the facts set forth in the petition of Brewster, was changed, by the statement of the assignee that he had never objected to the proof of debt of Brewster, and had registered it as duly proved, and that no objection had, since the election of the assignee, been made to the proof of the claim, by any creditor. It was not the duty of the assignee to bring the matter before the Court. He was not a party to the order of reference, and he discharged his entire duty by making the objection he did. The Court must now do what it would have done, if, on the making of such objection by the assignee, the matter had been brought to its attention. It would have vacated the order of reference. There would have been no propriety in permitting the reference to proceed as between Brewster and the petitioning creditor, when it could not proceed as between Brewster and the body of creditors represented by the assignee. Although, where one creditor applies for an investigation, under section 22, of the claim of another creditor, it may be proper to hold the latter bound, as respects all the creditors, by the result of the investigation, yet, where, as in this case, a creditor applies for the investigation of his own claim, and the assignee, in response, says he has received proof of the claim, and registered it, and has never objected

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to it, it is not proper to permit an investigation of it to be had, as between such creditor and another creditor, against the objection of the assignee, when the estate cannot be bound by the result.

The order of reference is vacated, leaving the parties respectively to pay their own costs and expenses.

J. K. Murray, for Brewster.

T. M. North, for the assignee.

Eastern District of New York.

OCTOBER, 1872.

NINE THOUSAND SIX HUNDRED AND EIGHTY-ONE DRY OX HIDES, &c.

FREIGHT.—WEIGHT BY INVOICE.—EXPENSE OF WEIGHING.—COSTS.

The owner of a bark filed a libel against her cargo of hides to recover freight.

The hides were shipped in Buenos Ayres, to be delivered at New York on payment of freight at so much per pound. They arrived in good order, and were tendered to the consignee, to be delivered on payment of \$1,515 79, freight. This amount was arrived at by taking the weight stated in the invoice and entry presented by the consignee at the Custom House on his entry of the goods. The bill of lading did not state any weight. As the consignee refused to pay the amount claimed, the owner of the ship filed a libel against the hides to recover the freight, and the consignee gave a stipulation for value, and took them. On the trial, the consignee proved an actual weighing of the hides after they were delivered, in accordance with which the freight would be \$1,417 01:

Held, That, in the absence of a statement of weights in the bill of lading, the ship was entitled to freight only on the weight delivered, and that the weight stated in the invoice and entry was not conclusive on the consignee;

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That the ship is bound to weigh the cargo, whenever a weighing is necessary to enable her to compute her freight;

That the ship was entitled to a decree for the amount of freight calculated on the weight proved to have been actually delivered, viz., \$1,417 01.

And it appearing that the answer admitted that freight was due, but that the amount admitted to be due was not tendered or paid into Court:

Held, That the libellants were entitled to costs.

BENEDICT, J. The facts out of which the present controversy arose are not in dispute. Garden B. Perry shipped on board the bark *Ada Gray*, then lying at Buenos Ayres, a quantity of hides, to be transported thence to the port of New York.

The hides were taken on board by number, and not by weight, and a bill of lading was given which acknowledged the receipt on board of 9,681 dry ox and cow hides and 478 dry kip skins, to be delivered at New York to Brown Bros. & Co., or their assigns, "he or they paying freight for the said hides and kips, five-eighths of a cent, United States gold, per pound, with five per cent. primage and average accustomed."

The voyage was duly performed, and the hides arrived in New York in like good order and condition as shipped, and their delivery was tendered to the proper consignees upon payment of the sum of \$1,515 79, as freight and primage. This amount was arrived at by taking for a basis of calculation 230,977 lbs., the weight shown in the invoice and entry of the hides presented by the consignees at the Custom House, and according to which they paid the duties.

The right of the ship to demand freight so calculated was disputed by the consignee, who insisted that the proper mode of calculation was to take the weight of the hides landed, as ascertained by an actual weighing. The freight, when so calculated, they offered to pay on receiving the cargo. In order to obviate the difficulty, which thus arose in the discharging of the ship, this action *in rem* against the hides was instituted by the

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owners of the ship, to enforce a lien for the amount of freight as calculated by them. The consignees intervened, and, upon giving a stipulation for value in a sufficient amount, received the hides. They then joined issue with the libellant, and the dispute is thus before this Court for its determination. The rights of the parties in the premises do not appear to me to be in doubt.

"The net quantity," says McLachlan (p. 392), "ascertained by the queen's scales or bushel at the port of delivery, is the measure of freight payable by the merchant." The contract of a bill of lading like the present, is that the freight is to be paid on the quantity shipped, carried and delivered (*Gibson v. Sturge*, 10 *Ex.* 621). See *German Mercantile Law*, book v, part 5, art. 621. It is upon this understanding of the contract expressed in a bill of lading that, when living animals are to be transported, and some die, freight is paid only on those which arrive (*Pet. Ad.* 125). So also the weight of sugars and of molasses at delivery, which is always less than the weight shipped, determines the amount of freight (*Abbott*, 430).

The usage of this port, as shown by the evidence, conforms to this understanding of the contract, for it is proved not to be customary to pay freight on hides by the invoice weight, but according to the weight delivered, as the same may be agreed on, or ascertained by weighing. Furthermore, in this instance, the cargo was shipped by number and to be delivered by number. It does not appear to have been weighed when shipped, and no statement of weight is made in the bill of lading, although the freight was agreed to be paid by weight, and although such a statement made in the bill of lading would doubtless have furnished the basis for the calculation of freight (*German Mercantile Law*, art. 658, book v, part 5). This omission to ascertain the weight at the shipment warrants the inference, that the parties understood that

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the weight at delivery would determine the amount of the freight.

Unless, then, the weight by which the duties were paid, and to which the shipowner resorted for the basis of his calculation of the freight, was the correct weight of hides delivered, the position taken by the libellant cannot be upheld.

It is, indeed, true, that in many countries the weight of cargo, by which duties are paid, is the weight upon which freight is calculated. But I think it will be found that in such cases there is an actual weighing required by law, and made by officials according to law. The Custom House weight in such cases is therefore the actual weight delivered, as legally ascertained. But here there is no such ascertainment of the actual weight. The sworn statement of the consignee, coupled with the invoice, furnish the basis upon which duties are paid; and if, in a suit for freight, the action of the consignee in respect to the duties be competent evidence, as an admission, to show the weight of hides landed, it is not conclusive.

In this action, therefore, the actual weight of hides landed is open to be shown. Accordingly, it has been made to appear by an actual weighing of the hides, which the consignee caused to be made after his receipt of the cargo, and when there is no reason to suppose that any change in weight had occurred, that the weight of hides delivered was 224,002 lbs. instead of 230,977 lbs. From which it results that the freight and primage due on delivery of the hides was \$1,417 01 instead of the \$1,515 17, which the shipowner had demanded.

A further question has been discussed in this cause, and that is, upon whom rests the obligation to weigh the cargo, under a bill of lading like the present. My opinion is that, in the absence of an agreement to the contrary, the ship is bound to weigh the cargo whenever a weighing is necessary to enable her to compute the

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amount of her freight. "The person who wants to ascertain the quantity must pay the expense of weighing." Willis, J., *Coutthard v. Sweet* (*Law Rep.* 1 C. P. 654). See, also, *The Schooner Treasurer* (1 *Sprague*, 474). The same rule appears to prevail upon the continent of Europe. Thus it was adjudged by the Tribunal of Commerce of Havre, in 1861, that when the freight can only be determined by weighing the cargo, the shipmaster must bear the expense. (*Recueil de Jurisprudence Commerciale Maritime du Havre*, 1861, part 1, p. 135). On the contrary, when a weighing is not necessary for a determination of the freight, as is the case when the freight is made payable by the weight given in the bill of lading, the expenses of weighing are adjudged to be borne by the owner of the goods (Judgment of Tribunal of Nantes, 1863, n. 64, q. 60. See *Caumont, Traité Affrètement*, 252; also, *Traité Fret*, 89.) There remains to indicate the proper decree to be made in this action, under the views of the law above expressed. The prayer of the consignee is that the libel be dismissed with costs, upon the payment of the freight by the consignee. But I am of the opinion that the right to recover the freight, if imperfect at the commencement of the action, may be considered to have become perfect upon the subsequent receipt by the consignee of the whole number of hides in good order; and inasmuch as by giving the stipulation for value, a stipulation was substituted for the property, the interest of the shipowner in the cargo should be considered as transferred to the proceeds of the stipulation. The libellants should therefore take a decree directing their freight, conceded to be due them, to be paid out of the proceeds of the stipulation. Such a practice renders a proceeding like the present very convenient in cases of dispute in regard to freight, as it enables the consignee to receive his cargo promptly without paying a demand which he deems illegal, and enables the shipowner to

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obtain a security for his freight which, while it fully protects his rights, saves risk and expenses in regard to the cargo. The decree will therefore be in favor of the libellant for the sum of \$1,417 01, gold, with interest from the time of landing the cargo, less, however, the taxed costs of the claimants in this action.

Clearly the libellants are not entitled to costs, for they wholly fail to maintain the position taken by them. On the other hand they should pay costs, because, if the cargo had not been bonded, a dismissal of the libel with costs would have been the result of the action; and the claimants should not suffer by reason of having substituted a stipulation in place of the property, as that course was equally for the advantage of the libellants and the claimants.

The case was afterwards opened for further evidence bearing on the question of costs, on which the following opinion was rendered:

BENEDICT, J. This case having been opened for further testimony bearing upon the question of costs, and it now appearing that before the filing of the libel the merchandise in question had passed into the control of the claimants, and it also appearing that the answer of the claimants admits that freight was due at the filing of the libel, and it also appearing that the amount of such freight, when ascertained, was not paid into Court pursuant to the Rules of Court, it is therefore ordered that the decree in this case be for the amount of freight heretofore found due, namely, \$1,417 01, gold, with interest, and that the libellants recover also their costs of this action, to be taxed.

For libellants, *Beebe, Donohue & Cooke.*

For claimants, *Wakeman & Latting.*

Northern District of New York.

OCTOBER, 1872.

THE UNITED STATES OF AMERICA v. JOHN B. HALSTED AND OTHERS.

BOND OF INTERNAL REVENUE COLLECTOR.—PLEADING.—EXECUTING BOND IN BLANK.

To an action in debt on the bond given by a collector of internal revenue against such collector and his sureties, the defendants joined in pleading *non est factum* :

Held, That, under such a joint plea, the defendants must sustain it as to all, or fail as to all.

The execution of such a bond by the sureties, with the date left blank, authorizes the principal to fill the blank at his discretion.

HALL, J. This suit is prosecuted by the United States against John B. Halsted, late a collector of internal revenue for the 29th district of New York, and nineteen others, as his surviving sureties, upon his official bond as such collector, bearing date March 28, 1863. The declaration is in debt upon this bond, and assigns breaches of the condition of the bond, by failure to account for and pay over moneys of the United States which came into the hands of said Halsted, as such collector. The defendants appeared and joined in pleading *non est factum* and performance. The cause was, by stipulation, referred to P. L. Ely, Esq., as referee, who reported in favor of the United States, and assessed their damages, by reason of the breaches assigned, at \$25,450 48.

The defendants excepted to all the material findings of fact reported by the referee, and to his conclusions of law thereupon, and then moved to set aside the

referee's report, as against the evidence and the law of the case. The motion to set aside the report was, by stipulation between the counsel for the respective parties, heard, upon the minutes of the testimony taken by the referee, and his report, and the exceptions thereto.

It appears, upon the minutes of the referee, that the "original bond of the defendant John B. Halsted, as collector of internal revenue, * * * executed by him, said Halsted, and the other defendants, bearing date March 28, 1863 (being the bond declared upon)," was put in evidence by the district attorney, without objection; though it was afterwards stated that it was understood that the defendants might thereafter make such objection to the evidence (then) already given (which included said bond) as they should be advised, with the same force and effect as though made at the offering thereof.

The execution of this bond by the several obligors was afterwards sworn to by Alonzo B. Rose, a justice of the peace, and a subscribing witness to the bond. He also testified that his son's signature, as subscribing witness to the execution of the bond by all, except one, of the obligors, was genuine, and that his son died in April, 1868; and that the signature of Gilbert Scofield, as a witness to the signature of the one obligor, was also genuine. He subsequently testified that the bond was executed in March, 1863; and that, at the same time, the several sureties signed and swore to the affidavit of justification annexed. Gilbert Scofield testified to the due execution of the bond by the one obligor above mentioned, and also to the genuineness of the signature of Henry W. Rose, the said son of Alonzo B. Rose, whose name appeared as such subscribing witness. On a subsequent examination, Alonzo B. Rose testified to a charge against Halsted, for his services, as fixing the time of the execution of the bond in the last few days of March, 1863.

The United States v. Halsted.

The defendants Benson Tallman, John E. Lowing, Charles B. Briggs, Marcey W. Wilmer, Alonzo Hopson, David Taggart, Peter Dunn, Joseph Ingham, Benjamin F. Bristol, Lester B. Crigo, Levi Madison, John Renwick, George Wheeler, and William Bristol, were called as witnesses for themselves and their co-defendants, and all admitted that their signatures to the bond declared on, and to the affidavit of justification annexed, were authentic; but they all more or less positively denied the execution of any bond, as surety for Halsted, after the 1st of October, 1862. It appeared, by the evidence, that Halsted was first appointed by the President in the recess of the Senate, and prepared and executed, with certain sureties, an official bond, which was disapproved and rejected by the officer, authorized by the Treasury Department to take his official bond and deliver his commission; and that, a few days afterwards, and in September, 1862, a new bond was executed, and approved and filed at Washington. It also appeared that Halsted, having been confirmed by the Senate, in March, 1863, was recommissioned, and then forwarded the bond in suit to the Treasury Department, and the theory of the defence was, that the bond in suit was the one rejected. But Alonzo B. Rose swore that he was one of the sureties on that bond, and there are other facts proved in the case, which very strongly tend to show that this position cannot be maintained. I am strongly inclined to the opinion, that the bond in suit was not the one so rejected, and that the defendants, who, after the lapse of more than seven years, swore that they executed no bond after the 1st of October, 1862, are mistaken—honestly mistaken—in so testifying, or, rather, are mistaken in their recollection.

At all events, the question is one of fact, and the finding of the referee upon such a question, when there is much evidence on both sides, and ground for serious doubt, should not be disturbed. The finding of the referee, upon that question, must be confirmed.

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But aside from this, there are two objections to this defence. The first is, that the defendants have all joined in the plea of *non est factum*, and that the defendant Halsted confesses its proper execution by himself; and there is no evidence to show that it was not executed by Christopher Post, Isaac V. Quackenbush, Orace V. Whitcomb, and Levi Trusdell, who were living, and were not sworn as witnesses, or by Tabor and Keeton, who are dead. The defendants having put their defence upon the joint plea of *non est factum*, they must sustain it as to all, or fail as to all (U. S. v. Linn, 1 *Howard U. S. Rep.* 104). The second is, that, at most, the evidence shows the execution of a bond, with a blank date, and the subsequent insertion of a date before its delivery to and acceptance by the officers of the Government. The execution of the bond as surety for Halsted, with the date in blank, would have authorized him to fill the blank at his discretion, and the bond is, therefore, valid in the hands of the Government.

The motion to set aside the report is denied, and the report confirmed, and judgment final ordered thereon.

OCTOBER, 1872.

JOHN HOSMER v. SHERMAN S. JEWETT, ASSIGNEE IN BANKRUPTCY OF THE BUFFALO FIRE AND MARINE INSURANCE COMPANY.

PLEADING.—RE-INSURANCE.—PROPERTY HELD IN TRUST.—COSTS.

A bill in equity was filed against the assignee in bankruptcy of the B. Insurance Company, alleging that such company had insured the complainant's vessel for \$10,000; that the B. Company obtained a re-insurance for \$5,000 of the S. Insurance Company; that there was a total loss of the vessel, and a right to re-

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cover the whole loss of the B. Company; that the B. Company applied to the S. Company for payment of the \$5,000, and, as a condition of receiving it, promised and agreed to and with the S. Company that it had paid, or thereupon immediately would pay the \$10,000 to the plaintiff; and thereupon the S. Company, relying on that promise and agreement, paid the \$5,000 to the B. Company, in trust to immediately pay the same over to the plaintiff; and the B. Company received the \$5,000 from the S. Company, in trust for the plaintiff, and in trust to immediately pay it over to him; and that the B. Company, proposing and intending to pay to the plaintiff the said sum of \$5,000 received from the S. Company, caused a letter to be written to him, wherein was inclosed the said sum of \$5,000, and delivered the same to their secretary to send to the plaintiff, which the secretary did not do, but delivered the letter and the \$5,000 to the defendant, who received it in trust for the plaintiff.

The assignee demurred to the bill for want of equity.

Held, That a demurrer admits all relevant facts stated in the bill, but does not admit the conclusions of law drawn therefrom, although they are also alleged in the bill;

That a demurrer to a bill for want of equity cannot be sustained, unless no discovery or proof properly called for by, or founded on, the allegations of the bill, would make the subject-matter of the suit a proper case for equitable interference;

That money, delivered to the bankrupt in trust, if ear-marked, or separately kept and retained as trust property to be delivered or paid over in the same bills or coin in which it was received, would not pass under the assignment in bankruptcy, but would be considered as "trust property;" but an amount of money due from the bankrupt, as a trustee, and which could not be distinguished from any other moneys in his possession or under his control, or which was only due from him because he had used trust funds for his own purposes, could not be considered as "property" held by the bankrupt in trust;

That the plaintiff could only maintain this suit on the ground of an express trust, and not because a trust in his favor had been created by the mere operation of law;

That the allegations of the bill as to a trust must be held to be allegations of fact, and not of conclusions of law; and that, under the allegations of the bill, the plaintiff would be allowed to prove that the \$5,000 was paid by the S. Company, and received by the B. Company, under an express trust;

That the plaintiff would also have the right to prove that the identical money so received by the bankrupt was retained as trust property, separate and distinct from the proper estate of the corporation;

That the demurrer must, therefore, be overruled, and the defendant must answer, but, as the case was one of serious doubt, without payment of costs.

HALL, J. This case comes before the Court upon a demurrer to the plaintiff's bill, for want of equity.

The bill sets forth the making of a policy of insurance.

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ance by the bankrupt, by which the plaintiff was insured in the sum of \$10,000, against certain perils of navigation, upon an undivided half interest in a vessel called the C. H. Hurd, and her subsequent total loss ; by which the bankrupt became liable to pay the plaintiff the said sum of \$10,000. It also sets forth that after such policy was made, the bankrupt corporation, "in order to indemnify and save itself harmless from the risk it had so taken, *and to the end that it might provide greater security for itself and your orator*" (the said plaintiff) "in case of the loss of said ship or vessel, the C. H. Hurd, and *for its and HIS indemnity*," did apply to the Security Insurance Company of New York for, and did procure from it, a policy by which the last-named company "did insure the said Buffalo Fire and Marine Insurance Company in the sum of \$5,000 upon the ship or vessel the C. H. Hurd, whilst said ship or vessel should be upon the waters of lakes Erie, Michigan, St. Clair, or Huron, *against* and upon the risk and insurance so taken by it, the Buffalo Fire and Marine Insurance Company," * * * "and did promise and agree thereby that, in case said Buffalo Fire and Marine Insurance Company should thereafter lawfully pay, or cause to be paid said sum of \$10,000 to" the plaintiff, "for any loss of said ship or vessel so insured" under the first-named policy, the said Security Insurance Company would pay to said Buffalo Fire and Marine Insurance Company the sum of \$5,000.

The loss of the vessel, and the furnishing of the proofs of loss, and the other facts necessary to show the liability of the Buffalo Fire and Marine Insurance Company, are then properly stated.

The bill then further sets forth, that afterwards the Buffalo Fire and Marine Insurance Company, through its secretary, applied to the Security Insurance Company for the \$5,000 so by it insured on said policy of insurance secondly referred to ; that said Security Insurance Company demanded, as a condition of the payment of

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said money, proof that the Buffalo Fire and Marine Insurance Company had paid the plaintiff the said sum of \$10,000, for and on account of the loss of the C. H. Hurd; and then states that "thereupon the said Buffalo Fire and Marine Insurance Company through its said secretary, *as a condition of receiving said sum of \$5,000, did assure, promise, and agree to and with the said Security Insurance Company, that it then had, or thereupon immediately would pay the said sum of \$10,000 unto your orator upon and for said loss; and thereupon the said Security Insurance Company, relying upon the said assurance, promise, and agreement, did pay the said sum of \$5,000 to the said Buffalo Fire and Marine Insurance Company, in trust to immediately pay the same over unto your orator; and the said Buffalo Fire and Marine Insurance Company, well knowing that it had not paid the said sum of \$10,000, or any part thereof, unto your orator received said sum of \$5,000 from said Security Insurance Company, in trust for your orator, and in trust to immediately pay the same over unto him.*"

The bill then further alleges that the Buffalo Fire and Marine Insurance Company, through its proper officer, professing and intending to pay the plaintiff *the said sum of \$5,000* received from the said Security Insurance Company as aforesaid, did, after the receipt thereof by it, as aforesaid, and on or about the 9th of October, 1871, write, or cause to be written to the plaintiff a letter, directed to him at Detroit, wherein was by it enclosed the said sum of \$5,000, and did deliver the same unto its then secretary, with intent that he should send, deliver, and transmit the same to the plaintiff, through the United States mail; which letter, it is alleged, is in the possession or under the control of the defendant; that said secretary did not send, deliver, or transmit said letter, and the said \$5,000, to the plaintiff, as he should have done, but afterwards delivered said letter, and said sum of \$5,000, to the defendant, as receiver appointed

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in this proceeding; and that said defendant, as such receiver, and, subsequently, as such assignee in bankruptcy, received the said sum of \$5,000, so paid to the bankrupt, in trust for and to the use of the plaintiff, and now holds the same; and that the plaintiff has demanded the said sum of \$5,000 from the said defendant.

The bill also makes the proper allegations in respect to the proceedings in bankruptcy, and the appointment of the defendant as receiver, and subsequently as assignee therein.

The defendant interposed a demurrer to the whole bill for want of equity, and the case has been heard upon the bill and demurrer.

The main difficulty, which has been felt in the disposition of this case, is that of determining what must be deemed admitted by the demurrer. This difficulty results from doubts arising upon the attempted application of the established rules of pleading, rather than from the difficulty of determining what rules are applicable to this case, or the form of language by which such rules have been authoritatively expressed. A demurrer admits all relevant facts that are well pleaded, but denies that upon such facts the plaintiff is entitled to relief (*Welford's Equity Pleading*, 261; *Mitford's Pleading*, 211; *Story's Equity Pleading*, sec. 452), but it does not admit the conclusions of law, or supposed legal inferences drawn therefrom, although they are also alleged in the bill (*Story's Equity Pleading*, sec. 452, and cases and authorities there cited; *Welford's Pleading*, 261; *Cooper's Equity Pleading*, 111).

The bill is founded upon the allegations that the bankrupt, in the first instance, and the defendant subsequently, received the sum of \$5,000 *in trust* for the use of, and to be immediately, or within a reasonable time, paid over to the plaintiff; and the 14th section of the bankruptcy Act expressly provides that "no *property* held

by the bankrupt *in trust*, shall pass by" the assignment made to the assignee in bankruptcy proceedings. Money delivered to the bankrupt *in trust*, if ear-marked or separately kept and retained as *trust property* to be delivered or paid over in the same bills or coin in which it was received by the bankrupt, would not pass under such assignment, but would be considered as "*trust property*;" but an amount of money due from the bankrupt as a trustee, and which could not be distinguished from any other moneys in his possession, or under his control; or which was only due from him because he had used trust funds for his own purposes, or otherwise misapplied them, could not be considered as "*property*," held by the bankrupt *in trust*.

All debts and claims, arising out of a misapplication of trust funds, or for a general balance of moneys due upon the accounts of a bankrupt as a trustee, must, therefore, be considered as debts provable against the estate of the bankrupt like any other debt; but such debts, being debts of a fiduciary character, are not discharged or impaired by the discharge in bankruptcy (*Sec. 33 of the Bankruptcy Act; In re Janeway, 4 Bky. Reg., 26; Ungewitter v. Von Sachs, 3 Bky. Reg., 178*).

As a general rule, a demurrer for want of equity cannot be sustained unless the Court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations of the bill, can make the subject-matter of the suit a proper case for equitable cognizance (*Bleecker v. Bingham, 3 Paige, 246*).

Assuming the accuracy of the propositions of law above stated, the allegations and substance of the bill will now be considered.

It is not alleged by the bill that the reassurance was obtained by the bankrupt as the agent of, or even by agreement with, the plaintiff; and there is nothing in the bill upon which the allegation of a trust can be sustained, except that which is alleged to have occurred at

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and after the time the application to the Security Insurance Company, for payment, was made by the bankrupt corporation. Up to that time nothing had occurred giving the plaintiff any right, except the strictly legal right he had against The Buffalo Fire and Marine Insurance Company, under the policy of insurance issued by that company ;—a right which was not a subject of equitable cognizance. Nor would the plaintiff have had a right to sustain his bill, upon any supposed necessary implication of a trust arising upon the facts and circumstances alleged, independent of the allegations which expressly state that the \$5,000 was paid by the Security Insurance Company, and received by the bankrupt, *in trust* for the purposes in the bill alleged. In other words, the plaintiff can only have relief in this suit upon the ground of an *express trust*, and not because a trust in his favor has been created, or exists, by the mere operation of law.

It was insisted by the counsel for the defendant, that the facts alleged did not furnish either any ground for equitable relief, or for any preference against the assets of the bankrupt ; and the plaintiff's counsel very properly conceded that no equitable claim nor preference was created or exists in favor of the plaintiff simply by reason of the reinsurance made by The Security Insurance Company ; but he claimed that the bankrupt received the \$5,000 in controversy *in trust* for the plaintiff, as alleged in the bill, and upon the trusts therein stated, and that the plaintiff was, therefore, entitled to the relief sought.

In determining the proper construction of the allegations of the bill in regard to the alleged trust, and in respect to the moneys in controversy having been kept by the bankrupt *as trust property*, separate and distinct, and distinguishable from the individual moneys or general funds and property of the bankrupt, and especially in respect to the statements that the \$5,000 in con-

trover was paid and received under an express trust, it is proper to consider, to some extent at least, the relations between the said insurance companies, and between the plaintiff and each or both of them, at the time when the bankrupt applied to the Security Insurance Company for payment.

At that time there was no privity between the plaintiff and the Security Insurance Company, and as against the bankrupt he had no claim or demand except the purely legal right which he had under the policy issued to him by the bankrupt. The bankrupt had, in fact, no present right to demand the payment of \$5,000 from the Security Insurance Company, because, by the terms of its policy, it was liable to be called upon for such payment only after the bankrupt had paid the plaintiff his loss; and such loss had not been paid. The Security Insurance Company, so far as the bill shows, had no direct pecuniary interest in the payment of the loss to the plaintiff, for although the bankrupt was not entitled to demand the \$5,000 until payment to the plaintiff had been made, it is very clear that the payment of \$5,000 to the bankrupt, upon and in discharge of its policy, although the payment was not then presently and legally demandable, would fully discharge the liability of the Security Insurance Company, as much as though the bankrupt had previously paid the plaintiff's loss. Nevertheless, I cannot say that the Security Insurance Company may not have considered that it had a pecuniary interest in securing the payment of the full amount of the plaintiff's loss, either because it hoped thereby to secure from the plaintiff and others the business of insurance which he had, or might control; or to gain business from others upon the increased reputation for liberality and promptness which the public knowledge of the transaction might give it. And it is not impossible that there were other motives for imposing an obligation on, or reposing a trust and confidence in,

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the bankrupt; and the Security Insurance Company was certainly in a position to prescribe the conditions, upon which it would make the payment before it was legally demandable.

Now, the allegations of the bill, expressly and directly made, are, in substance, that the Security Insurance Company *paid* and the bankrupt *received* the \$5,000 mentioned in the bill, *in trust* for the plaintiff and *in trust* to immediately pay the same to the plaintiff;—an allegation which in substance states such payment and receipt *under an express trust*. Such would surely be its proper construction and effect were it not accompanied by the allegations of the bill, which give a history of the relations and transactions of the plaintiff and of the insurance companies; and, it is very clear that, under these allegations, the plaintiff would be allowed to prove an express trust to the effect stated in the bill. It is not a mere allegation that the bankrupt held the money in trust for the plaintiff, but that it was *paid and received* under the trust stated;—a proper form of allegation to show such payment and receipt under an orally expressed trust.

I shall therefore hold, though not without some hesitation, that these allegations of a trust are allegations of fact, and not of conclusions of law; and that the demurrer must be overruled unless some other and sufficient objection can be urged against the plaintiff's bill.

Assuming, then, the existence of an express trust, the question whether the \$5,000 in controversy must, under the allegations of the bill, be deemed "*trust property held by the bankrupt*," and which did not, therefore, pass to the defendant as assignee, will now be considered.

The bill affords no entirely solid and certain ground upon which to determine this question.

It does not aver that the \$5,000 was received in bank-bills or Treasury notes, or give any other description of the money received; nor does it aver that it was kept

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by the bankrupt in the same form, or in any special manner as trust property; or that the money, inclosed in the letter referred to, was in fact the same identical money or currency received from the Security Insurance Company; but it does aver in connection with the averment of the payment and receipt of the money, that it was so paid and received in trust to pay (not to deliver) "*the same*" over to the plaintiff; that the *said sum of \$5,000* was inclosed in the letter so written and directed to the plaintiff; that *the same* was delivered to the secretary of the bankrupt; and it is fairly to be understood from the allegations of the bill that this letter *and its contents* were afterwards received by the defendant as receiver and as assignee.

Under these allegations the plaintiff would have the right to prove that the same identical money so received by the bankrupt was in fact retained and kept by the bankrupt as trust property, separate and distinct from the proper estate, assets and property of the corporation (*Bleecker v. Bingham, ubi supra*);* and it is therefore held, under the authority of that case, that the demurrer for want of equity should not be allowed on account of the apparent uncertainty of these allegations; such uncertainty arising from their general character and broad scope, which will authorize, as well as require, special and definite proof not in conflict with, but in direct affirmance of, such general allegations.

The demurrer is overruled, but the doubts arising upon the construction of the very general and in some respects vague and uncertain allegations of the bill, are so serious, that I do not feel at liberty to charge the bankrupt's estate with costs as the condition of allowing the defendant to answer.

The defendant must put in his answer to the bill within twenty days after the entry of the order herein, or the bill may be taken as confessed.

* And see *Getty v. Campbell*, 2 *Robertson N. Y. Sup. Court Rep.* 664.

Southern District of New York.

NOVEMBER, 1872.

THE UNITED STATES v. TWO TRUNKS CONTAINING FRINGE, &c.

FORFEITURE.—GOODS CONCEALED ON BOARD OF A VESSEL.—SEIZURE BY INSPECTOR.

On the arrival of a steamer at New York from France, two inspectors of customs were on board after all the passengers and their baggage had been landed. From some remarks which excited suspicion, they went to a state room which was locked, and in which was the barber of the vessel. Under a berth in the room they found two trunks containing fringes, braid, &c., without any articles of personal baggage. The trunks were marked with the name of the purser of the ship, but without his authority or knowledge. They were claimed by a man who occupied the room, and who had come in the ship, giving his services as second steward for his passage, receiving no wages and not being entered on the crew list. He had no invoice of them. He had made no declaration of their contents as dutiable, and they were not entered on the manifest of the ship. The inspectors seized the trunks. A libel was filed to forfeit the trunks and their contents, alleging a seizure by the collector. It was urged in defence, that the trunks were not concealed, and that the seizure was not made by the collector:

Held, That, under the 68th section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 677), goods, subject to duty, found concealed on board of a vessel, are subject to forfeiture, and all that the Government is bound to show, to make out a *prima facie* case for forfeiture, is that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer;

That the contents of these trunks were found concealed;

That, under the 2d section of the Act of July 18th, 1866 (14 *Id.*, 178), the inspectors were authorized to seize them, and the libel might be amended accordingly.

BLATCHFORD, J. The libel of information, in this case, proceeds against certain property as having been seized by the collector of the port of New York, on the 21st of November, 1871, on board of the steamer *Ville de Paris*, and as being forfeited to the United States for

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a violation of sundry sections of sundry statutes, and, among them, the 68th section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 677). That section provides, that every collector, or other person specially appointed by him for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods subject to duty are concealed, and therein to search for, seize and secure any such goods, and that all such goods on which the duties shall not have been paid or secured to be paid shall be forfeited. There is a count in the libel, alleging that the said collector, having reason to suspect that goods subject to duty were concealed in the said vessel, did, on the said day, enter the said vessel, and therein search for, seize and secure the goods named in the information, which were therein concealed, and on which the duties had not been paid, or secured to be paid, contrary to the said 68th section.

Firmin Serenne, who claims to be the owner of the goods in question, came as a passenger in the ship, with the goods. The goods were not entered on the manifest of the vessel, and were not contained in cases, but were in trunks. Serenne had previously been steward on the *Lafayette*, a vessel of the same line, plying between New York and Havre, in France. On this occasion he gave his services as second steward on the voyage, as compensation for his passage, receiving no wages, and not being entered on the crew list. The trunks in question were not marked with his own name, but were marked, one if not both of them, with the name and title of office, in French, of the purser of the vessel. On the day in question, after all the baggage of the passengers had been landed from the vessel, she being alongside of her wharf at pier 50, North river, two inspectors of the customs were on board of the vessel. Hearing some remarks which excited their suspicions, they obtained access to one of the state rooms, which was locked on the

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inside, and within which at the time was the barber of the vessel, whether with the claimant or not does not distinctly appear. The trunks in question were found under a berth in this state room, it being the state room occupied by the claimant. The claimant had no invoice of the goods in the trunks. After one of the trunks, one which had on it the name of the purser, had been discovered, an effort was made by the barber, in the absence of the officers, to erase the name of the purser. One of the inspectors seized the trunks and took them to the custom-house, with their contents. There was no wearing apparel, or articles constituting the contents of a passenger's baggage, in either one of the trunks that were seized. The trunks were not marked with the purser's name by the authority or direction of the purser, and he never saw or heard of the trunks until they were seized.

The 68th section of the Act necessarily implies, that goods subject to duty, found concealed on board of a vessel, may be in a condition to be subject to forfeiture, if the duties on them have not been paid or secured to be paid, even though they are seized while still on board of the vessel. Ordinarily, the duties on goods are not necessarily expected to be paid or secured to be paid while the goods remain on board of the vessel. But, where they are found concealed on board of the vessel, and the duties on them have not been paid or secured to be paid, the presumption arises, under the statute, that an intention exists to defraud the Government out of the duties. The seizing and securing of the goods for trial is authorized, if, when searched for, they are found concealed. All that the Government is bound to show to make out a *prima facie* case for forfeiture, is to show, that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer. It is then for the claimant to show that the duties were paid or secured to be paid.

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In the present case, the goods were subject to duty, were searched for, were found and were seized. It is contended by the claimant that they were not concealed. The libel of information alleges the seizure of "two trunks, containing fringe, buttons and braids," and it is contended that there was no concealment of the trunks, they being in a passenger's state room, under a berth, in a usual place for putting trunks; and that the fact, that the goods were in trunks, shows no concealment of them, inasmuch as goods are generally brought in trunks, boxes or envelopes of some kind. But, the libel proceeds against all the property seized, as well the contents of the trunks, as the trunks themselves. It cannot be regarded as a libel only against the trunks. The contents of trunks may be concealed, and yet the trunks themselves not be concealed.

On all the facts in this case, I cannot doubt that the contents of the trunks were found concealed, within the meaning of the statute. It is not shown that the duties on them were paid, or secured to be paid. The false marking of the trunks, the fact that they were not on the manifest of the vessel, the fact that they were not landed with the baggage, the fact that no declaration had been made of their contents as dutiable, the fact that no articles of personal baggage were in the trunks, and, in connection with that, the fact that the claimant had no invoice of the goods, and, in fact, all the circumstances attending the transaction, indicate a concealment of the goods, in such wise as to show an intention to avoid, if possible, the payment of duties on them, and a concealment, within the Act.

It is also urged, that the 68th section of the Act of 1799 forfeits the concealed goods only when they have been seized by a collector, naval officer, or surveyor, or by some person specially appointed by one of them for that purpose; and that, in this case, although the libel alleges a search and seizure by the collector, the evidence

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shows a search and seizure by an inspector of customs. But, the 2d section of the Act of July 18th, 1866 (14 *U. S. Stat. at Large*, 178), provides, that an inspector of customs may go on board of any vessel, and inspect, search, and examine the same, and any person, trunk, or envelope on board, and, if it shall appear that any breach or violation of the laws of the United States has been committed, whereby, or in consequence of which, such vessel, or the goods, or any part thereof, on board of such vessel, is or are liable to forfeiture, may make seizure of the same, or either or any part thereof. In this case the goods were liable to forfeiture, under the 68th section of the Act of 1799, because, the duties on them not having been paid, or secured to be paid, they were concealed on board of the vessel, and were found so concealed. There can be no doubt, that a seizure, under the 2d section of the Act of 1866, by an inspector of customs, of goods concealed on board of a vessel, under the circumstances named in the 68th section of the Act of 1799, is a valid seizure.

A decree must be entered condemning the goods seized, other than the trunks, under the 68th section of the Act of 1799. As to the trunks, there is nothing to show that they were subject to duty. The libel may be amended, before decree, to aver truly by whom the seizure was made.

H. E. Davies, Jr. (Assistant District Attorney), for the United States.

W. Stanley, for the claimant.

The Steamtug General William McCandless.

NOVEMBER, 1872.

THE STEAMTUG GENERAL WILLIAM McCANDLESS.

COLLISION IN EAST RIVER.—STEAMBOAT FOLLOWING ANOTHER.

Two steamtugs, the U. and the McC., were going down the East river, the U. being ahead. The McC. gained on the U., so as to lap her starboard side. A ferry-boat coming up behind them passed to the starboard of both tugs, and, as she was passing, the port bow or stem of the McC. came in contact with the starboard quarter of the U., and she shot off to starboard, across the bows of the McC., and struck the port side of the ferry-boat, receiving injuries, to recover for which a libel was filed, in her behalf, against the McC. No fault was charged by either party against the ferry-boat:

Held, That the case was one to which articles 17 and 18 of the Act of April 29th, 1864 (13 *U. S. Stat. at Large*, 61), apply. It was the duty of the McC. to keep out of the way of the U., and the duty of the U. to keep her course;

That, as the evidence showed that the U. kept her course, it followed that the McC. was in fault;

That the U., having the right of way, and having no reason to suppose that the McC. would hit her, was not bound to slow, on the approach of the ferry-boat;

That, whatever mistake the U. made in not stopping and backing, was, at most, an error of judgment, under circumstances of danger brought about by the McC., and was not, therefore, to be imputed to the U. as a fault.

BLATCHFORD, J. This libel is filed to recover against the steamtug General William McCandless the damages sustained by the libellants, as owners of the steamtug Unit, in consequence of a collision which took place on the 3d of May, 1871, in the East river, between the Unit and the ferry-boat Commodore Perry, by which the Unit was damaged. The Unit started from North Fourth street, Williamsburgh, bound to the vicinity of pier 12, East river, in a strong flood tide, between five and six o'clock in the afternoon. She ran over to the New York shore, and down in an eddy there, and then crossed over to the Brooklyn shore, from the point of Corlaer's Hook,

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reaching the Brooklyn shore about the lower end of the Navy Yard, and from there ran down along the Brooklyn shore for half a mile, to about off Adams street, Brooklyn, where the collision occurred. The McCandless went down along the New York shore astern of the Unit, and started to cross to the Brooklyn shore astern of the Unit, but held a more westerly course across than the Unit did, and so gained on the Unit as to lap her starboard side a short distance below where the Unit reached the Brooklyn shore. The ferry-boat was on a trip from South Seventh street, Williamsburgh, to Roosevelt street, New York. She was behind both of the tug-boats, and overtook them, and passed to the starboard of both of them. As she was passing, the port bow or stem of the McCandless came in contact with the starboard quarter of the Unit, and the Unit shot off to starboard across the bows of the McCandless, and struck the port side of the ferry-boat, under the guard of the ferry-boat, abaft her wheel. The ferry-boat was a side-wheel steamboat, and the tugs were both of them screw propellers. The Unit was seriously injured.

The libel alleges, that the course of the Unit was along the Brooklyn shore, and about one boat's length from the end of the piers; that, when the McCandless, with her stem, lapped the starboard quarter of the Unit, she was so close as to be within the suction of the Unit; that the McCandless gradually gained on the Unit, until they were nearly abreast, side by side, the McCandless still keeping close to the Unit and within her suction; that, when the bows of the ferry-boat had arrived at a point a little ahead of the Unit, the McCandless suddenly dropped back, so that her stem came alongside of the starboard quarter of the Unit, and her bow suddenly turned, either by the action of her wheel, or the suction of the Unit, against the starboard quarter of the Unit, pressing the bows of the Unit around against the port side of the ferry-boat; that the headway of the McCand-

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less was not stopped until after the Unit had struck the ferry-boat; and that the collision was caused by the carelessness and negligence of those navigating the McCandless, in not keeping further away from the Unit, in keeping within her suction, in dropping back, and either sheering her stem on the starboard quarter of the Unit, or permitting the same to be so sheered, in shoving the stern of the Unit around so as to throw her stem against the ferry-boat, and in not stopping and backing before the Unit struck the ferry-boat.

The answer avers, that the Unit headed down the river along the Brooklyn piers before the McCandless did so; that, after both vessels had headed down, they ran about side by side, always lapping each other, the McCandless preserving a uniform course of about 150 feet from the Brooklyn side, and the Unit making a zig-zag course in and out and near the end of the piers; that when the ferry-boat's stem had commenced to lap the starboard quarter of the McCandless, the McCandless was immediately slowed; that thereupon the Unit took a sudden sheer to the right; that then the helm of the McCandless was ported and she was immediately backed; that, before the McCandless could fall back, the helm of the Unit was put hard a-starboard, throwing her stern around so that it hit the port bow of the McCandless, and the course of the Unit was, in consequence, changed towards the course of the ferry-boat, so that she collided with the ferry-boat; that the collision was caused solely by the improper and unskilful navigation of the Unit, in not preserving a uniform course down the river, in not slowing on the approach of the ferry-boat, in not stopping and backing when it was discovered that the ferry-boat was approaching and might close in upon them, in not having the pilot or a competent person at the wheel, she being piloted by an incompetent and inexperienced deck hand, and in starboarding her helm and thus throwing her stern around

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and against the port bow of the McCandless ; that the McCandless slowed as soon as it was found that the ferry-boat would pass the two tugs to the starboard ; that, as soon as it was ascertained that the Unit, from her change of course, was closing in on the ferry-boat, the McCandless fell back, which was the only proper course ; that, in doing so, she would not have touched the Unit, but for the sudden starboarding of the Unit's wheel ; and that those directing and controlling the McCandless did everything in their power to avoid the collision, and it was in no way the fault of the McCandless or of those controlling her.

This is clearly a case to which Articles 17 and 18 of the Act of April 29th, 1864 (13 *U. S. Stat. at Large*, 61), apply. The McCandless was overtaking the Unit, and it was her duty to keep out of the way of the Unit. It was equally the duty of the Unit to keep her course. The McCandless did not keep out of the way of the Unit. She does not set up in the answer that what happened was due to any improper management or action on the part of the ferry-boat. Her excuse is based on alleged improper conduct on the part of the Unit. The evidence shows, however, that the Unit kept her course, and did not make a zigzag course, and did not starboard her helm, as alleged in the answer. It follows, that the McCandless was in fault.

But, in addition to this, the evidence shows positive fault on the part of the McCandless. She ought to have kept farther away from the Unit, and not have got within her suction, and she ought to have stopped and backed sooner than she did.

The only question is, as to whether the Unit neglected any precaution required by the special circumstances of the case. It is alleged that she ought to have slowed on the approach of the ferry-boat, and ought afterwards to have stopped and backed. But she had the right of way, and had no reason to suppose that the

The Propeller John Taylor.

McCandless would hit her, or would not stop and back in season to avoid all danger. Whatever omission the Unit made, in not slowing, stopping and backing, was, at most, an error of judgment, under circumstances of danger brought about wholly by the fault of the McCandless, and is, therefore, not to be imputed as a fault, as between her and the McCandless. If the ferry-boat had been damaged and were suing the Unit, a different rule might prevail.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

Beebe, Donohue & Cooke, for the libellants.

Wilcox & Hobbs, for the claimants.

NOVEMBER, 1872.

THE PROPELLER JOHN TAYLOR.

COLLISION IN NORTH RIVER.—STEAMBOATS CROSSING.

A ferry-boat, bound from New York to Jersey City, left her slip, on an ebb tide, under a port helm in order to get a good offing, so as not to be carried so far down as to be below a proper point from which to reach her slip on the opposite side of the Hudson river. Out in the river, and below her, was a propeller, coming up the river and having the ferry-boat on her starboard hand. When the ferry-boat cleared the line of the piers, her pilot, perceiving the propeller, blew one whistle. Receiving no reply, he blew another single whistle, to which the propeller responded with a single whistle. The propeller immediately slowed, stopped and backed her engine and put her wheel hard a-port, while the ferry-boat kept on without slowing, till her pilot saw that the propeller would hit the ferry-boat, when he starboarded his helm, changing the course of the ferry-boat, but not contributing to the collision which ensued, the propeller striking the ferry-boat on the port side nearly amidships:

The Propeller John Taylor.

Held, That as the courses of the vessels were crossing, and the propeller had the ferry-boat on her starboard hand, it was the duty of the latter to keep her course, and the duty of the propeller to avoid her;

That the propeller had no right to suppose that, as the ferry slip on the Jersey side was lower down the river than the one on the New York side, therefore the ferry-boat would drop down the river, and go under the stern of the propeller, because, the course taken by the ferry-boat was the usual one on such a tide;

That the ferry-boat was not in fault in keeping on without slowing, especially under the signals given;

That the propeller was solely in fault for the collision.

BLATCHFORD, J. This libel is filed by the owners of the ferry-boat John S. Darcy, against the propeller John Taylor, to recover for the damages sustained by the libellants in consequence of a collision which took place between the two vessels on the 31st of October, 1867, in the Hudson river, just below the ferry slip at the foot of Desbrosses street, New York, out of which the ferry-boat had gone, on one of her regular trips to the foot of Montgomery street, Jersey city. The propeller was bound up the river. The ferry-boat blew a long blast of her steam whistle before leaving her slip, and, as the tide was strong ebb, and the wind was north-west, increasing the set down of the ebb tide, and a large steamboat was backing around the upper end of the pier next below the ferry slip, the ferry-boat went out under a port helm, to get a good offing and not be carried down by the tide, either into dangerous proximity to the steamboat referred to, or so far down as to be below a proper point from which to reach her opposite slip in such a tide. No sooner had the ferry-boat cleared the line of the piers, than her pilot, perceiving the propeller, blew one blast of his steam whistle, to indicate that he would hold his course to the right, the propeller being then on his port hand and down the river. Receiving no response to this, he blew another single blast. To this the propeller responded by a single blast. The propeller immediately slowed, stopped, and backed her

The Propeller John Taylor.

engine, and put her helm hard a-port. The ferry-boat kept on, without any change of course, and without slowing, stopping or backing. When the pilot of the ferry-boat saw that the propeller would hit him, he starboarded, and produced some change in the course of the ferry-boat before the blow, but the starboarding was in the jaws of peril and had no effect to produce the collision. The ferry-boat did not slow, stop or back till after the collision. The propeller made considerable change in her course, by her porting, towards the ferry-boat, before the blow. The stem of the propeller struck the port side of the ferry-boat, a few feet abaft her side wheel on that side, and crushed in her guard, and opened a hole in her hull so that she soon afterwards sank. The propeller had the ferry-boat on her own starboard side. The collision took place about twenty minutes past five o'clock in the afternoon. There was daylight enough for each boat to see the other.

On these facts there can be no doubt that the propeller is solely responsible for this collision. It was her duty to keep out of the way of the ferry-boat, and it was the duty of the ferry-boat to keep her course. It is insisted that the courses of the two boats were not crossing, for the reason that, if the ferry-boat had dropped down with the tide, and gone between the propeller and the New York shore, the courses of the two vessels would not have crossed each other, and that, as the ferry slip on the Jersey side was lower down the river than the slip on the New York side, the propeller had a right to suppose that the ferry-boat would take that course. The answer is, that it is shown that the course the ferry-boat took was the usual course taken on such a tide, and that she maintained it from the moment she left her slip until the collision was unavoidable. As such a course crossed the course of the propeller, if it involved risk of collision, as is shown by the result, the propeller, in discharge of her duty to keep out of the

way of the ferry-boat, ought to have stopped and reversed long before she did. There would then have been no collision. It is also insisted that the ferry-boat should have slowed, stopped and backed before she did. But she would have been in fault if she had done so, especially after the single blast in response from the propeller, which indicated that the propeller expected the ferry-boat to keep going on in the course she was on.

It was conceded by the counsel for the propeller, in argument, that, if the propeller had paid no attention to the signal from the ferry-boat, and had kept on her course without slackening her speed or porting her helm, there would have been no collision. The propeller was free to choose the means of keeping out of the way of the ferry-boat, and was not bound to port her helm, because of the single blast from the ferry-boat.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.*

W. R. Beebe and J. C. Jackson, for the libellants.

C. Van Santvoord, for the claimants.

NOVEMBER, 1872.

IN THE MATTER OF PETER RADO, AN AL-
LEGED BANKRUPT.

PLEADING.—PREFERENCE.

A petition in involuntary bankruptcy, which states the giving to the petitioner of an unlawful preference in respect to the debt, but does not surrender the preference, will be dismissed.

* This decision was affirmed by the Circuit Court, on appeal, in January, 1874.

In the Matter of Richard H. Hinsdale and Edward E. D. Doughty, Bankrupts.

THIS was a petition in involuntary bankruptcy, which set forth a debt due to the petitioners, for tobacco sold and delivered by them to the bankrupt, to the amount of \$2,027 16, and alleged that on account of that he had returned to them tobacco worth \$1,140 10, at such a time as to make such return an unlawful preference of their debt to such amount.

For the petitioners, *R. S. Newcombe.*

For Rado, *Peter Cook.*

BLATCHFORD, J. The petitioners, having accepted an unlawful preference in respect of the debt set forth in their petition, cannot maintain the petition, so long as they do not, by the petition, surrender such preference. An opportunity will be allowed them to move, on notice, for leave to amend the petition in that respect. If no such motion is made, the petition must be dismissed.

NOVEMBER, 1872.

IN THE MATTER OF RICHARD H. HINSDALE
AND EDWARD E. D. DOUGHTY, BANK-
RUPTS.

REGISTER'S FEES.—SECOND MEETING.—TRUSTEE.

If a trustee, who has been appointed under the 43d section of the bankruptcy Act, call a second general meeting of the creditors, the fees of the register incident to such meeting are not chargeable against the estate.

THE register in this case certified to the Court that the property of the bankrupts had been, pursuant to the

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43d section of the bankruptcy Act, conveyed to a trustee, to be distributed under the direction of a committee of the creditors; that the question had arisen whether the estate was liable for the fees of the register incident to a second general meeting of the creditors; and that, in his opinion, the estate was not so liable.

BLATCHFORD, J. Assuming, though it is not so stated in the certificate of the register, that the second general meeting was called by the trustee, I find in the Act no authority or direction for the calling of such meeting by the trustee. I see nothing, therefore, in the facts certified that can warrant the charging against, or paying out of, the estate of the bankrupts, the fees of the register upon or incident to such meeting.

NOVEMBER, 1872.

IN THE MATTER OF WALTER S. DERBY, A BANKRUPT.

JURISDICTION.—INFANT.—RATIFICATION.

Infants, in respect to their general contracts, are not embraced within the provisions of the bankruptcy Act, as subjects of either voluntary or involuntary bankruptcy.

On the 7th of December, 1871, a petition in involuntary bankruptcy against D. was filed by S., who alleged, as the act of bankruptcy, the making by D. of a chattel mortgage to B. A. & W., on November 14th, 1871, he being then insolvent. D. was adjudged a bankrupt, and an assignee was appointed. On the 1st of December, 1871, an action was commenced in a State Court by P., as guardian *ad litem* of D., as an infant, against B. A. & W., to recover for an alleged conversion by them of the goods covered by the chattel mortgage. The assignee in bankruptcy, after his appointment, filed a bill in equity against B. A. & W. to recover for the alleged conversion of the same goods. Thereupon

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B. A. & W., in April, 1872, filed a petition in the bankruptcy Court, praying that the adjudication of bankruptcy against D. might be set aside, alleging, among other things, that D. was an infant when the petition was filed against him, which fact was, on a reference, established to be true. On the hearing, D., who had now become of age, presented a petition praying, among other things, for the confirmation of the bankruptcy proceedings against him:

Held, That B. A. & W. were in a position to entitle them to ask the interposition of this Court to vacate the adjudication;

That, as D. was an infant at the time of the filing of the petition, the Court had no jurisdiction to make the adjudication;

That the petition filed by D., after he came of age, for a confirmation of the bankruptcy proceedings, could not give the Court jurisdiction;

That, as D. was an infant, the giving of the mortgage to B. A. & W. was not an act of bankruptcy, because it was not an absolute transfer, but was subject to his election to affirm or disaffirm it when he came of age;

That the adjudication, and all the proceedings had thereupon, must be vacated.

BLATCHFORD, J. On the 7th of December, 1871, Frederick Stevens filed in this Court a petition in involuntary bankruptcy against Walter S. Derby. The debt set forth in the petition was alleged to be for goods sold to Derby in October and November, 1871. The act of bankruptcy alleged was the execution by Derby, while insolvent, on the 14th of November, 1871, to the firm of Barton, Alexander & Waller, of a chattel mortgage, to secure a claim of \$2,100, payable on demand, of his entire stock of goods and the fixtures in his store, with intent to give a preference to them, of which mortgaged property, it was alleged, they took possession three days afterwards. On the petition, an order to show cause was issued, returnable December 16th, 1871. On proof of the service of the order and of a copy of the petition on Derby on the 9th of December, 1871, an adjudication of bankruptcy was made against him on the 18th of December, 1871, to which day the matter had been adjourned. The proof of service was to the effect that the person making it went to the dwelling-house which was the last and usual place of abode of Derby in this District, and rang the door bell; that a woman of mature age came to the door, who appeared to be, and acted as if she was,

mistress of the house; that the person inquired for Derby by his full name; that she answered that he was not in, and declined to give any further information concerning him; and that the person then delivered to and left with her a copy of the petition and of the order, and stated to her that they were for Derby. Neither on the return day, nor on the adjourned day, did Derby appear, although called in open Court, and the Court was not advised that he was not of full age. The case was referred to a register, and a warrant was issued, and Frederick Dodsworth was elected assignee.

On the 5th of April, 1872, the said Barton, Alexander & Waller filed in this Court a petition, setting forth the execution of the mortgage to them by Derby, on a part of his stock, to secure \$2,199 40, due for the purchase money of the greater portion of the mortgaged goods; that the mortgage was not taken in violation of the bankruptcy Act, or to obtain a preference; that, on the 27th of November, 1871, Derby carried away and converted to his own use all his stock and goods, except some show cases and rubbish, which rubbish the petitioners afterwards sold under their mortgage, but realized nothing above expenses of sale; that, on the 1st of December, 1871, one Purdy, as guardian *ad litem* of Derby, as an infant, appointed by a State Court on the 29th of November, 1871, brought a suit in that Court against the petitioners, to recover \$4,000, as damages for the alleged conversion by them of the goods covered by the mortgage, claiming that the mortgage was void by reason of the infancy of Derby; and that said cause proceeded to an issue on the 12th of March, 1872, by complaint, answer, and reply, and was still pending. The petition then sets forth the filing of the petition in bankruptcy, and the issuing of the order to show cause, and alleges that said order was not left at the last or usual place of residence of Derby; that Derby did not reside, at the time, at the house where it was left; that the party serv-

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ing it was so informed; that it did not come into the possession of Derby; that he did not appear in the bankruptcy proceedings, either in person or by attorney or guardian; that the claim of the petitioners against him amounts to more than two-thirds of his entire indebtedness; that, at the meeting of creditors to elect an assignee, the petitioners were not allowed to vote; that the petitioners then and there filed with the register, and gave to the creditors, notice of the alleged infancy of Derby; that they afterwards served on the assignee notice of such alleged infancy, and of the pendency of such suit in the State Court; that, thereafter, the said assignee filed in this Court a bill in equity against the petitioners, claiming to recover from them \$5,000, as damages for the alleged conversion of the same goods involved in the suit in the State Court; that the petitioners have made every effort to find Derby, but have been unable to communicate with him or to discover the property; that, during the dealings of the petitioners with Derby, he was held out to them as, and they believed him to be, a person of full age; that, in fact, he was, and still now continues to be, an infant, under the age of twenty-one years, and incapable of contracting a debt or legal obligation; that Stevens never had a demand against him capable of being enforced at law, and the alleged debt to Stevens, on which the adjudication rested, was not a legal debt; that, by reason of such infancy, the said adjudication is void, as against the petitioners; and that the rights of the petitioners are prejudiced by the said adjudication, as they are subjected to two separate suits for one cause of action. They pray that the adjudication and the proceedings thereon be vacated, and the assignee be enjoined from prosecuting his suit.

On such petition, and affidavits annexed to it, and on the proceedings herein, an order was made requiring Stevens and the assignee to show cause why the adjudication and the proceedings had thereupon should not be

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vacated, on the ground that, at the time of the adjudication, Derby was an infant, and staying, in the mean time, all proceedings in the suit by the assignee. In answer, Stevens and the assignee set forth, by affidavit, that the sale of goods by Stevens to Derby, on credit, was made on the recommendation of the petitioners as to Derby's financial condition; that, a few days after such sale, the petitioners, by threats of legal proceedings, procured the mortgage which covered the goods so sold by Stevens to Derby; that Derby is a married man, and has been in business for himself for several years, and is over twenty-one years of age; that the petitioners have never proved any claim in bankruptcy, as creditors of Derby; that the house where the petition and order were left was the last and usual and known place of residence of Derby in New York; that Derby knew of the pendency of the bankruptcy proceedings from their commencement; and that, on the 5th of March, 1872, a final order was entered in the suit in the State Court, enjoining Derby from further prosecuting it, and authorizing the assignee, as such, to be substituted as plaintiff in it, and to prosecute it for the benefit of the creditors of Derby, but the assignee has no intention of so doing, and intends to rely on his suit in this Court.

The question of the actual infancy of Derby at the time of the adjudication being in doubt, the Court made an order for the taking of proof before a referee, as to the age of Derby at the date of the adjudication. Such proof is now before the Court, and the motion to vacate the adjudication has been heard. It clearly appears that Derby did not reach the age of twenty-one years until the 14th of May, 1872.

On the hearing, Derby presented to the Court a petition, verified by him on the 1st of June, 1872, and of which a copy was served on the attorneys for the petitioners on the 10th of June, 1872, setting forth that he

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resided, for six months immediately preceding the filing of the petition of Stevens, in this District, and had continued to reside there, and now resides there; that he was owing debts at the time of filing said petition, and is now owing debts, which he is unable to pay, to an amount exceeding \$300; that he was indebted, at the time of filing said petition, to Stevens, in the sum mentioned in said petition, and to three other creditors, whom he names, in sums which he names, the aggregate of the four being \$895 01; that at the time of contracting such debts he was a minor, but was engaged in business on his own account; that said debts were just, and were contracted in good faith, and would have been paid long since had not Barton, Alexander & Waller, on the 17th of November, 1871, wrongfully seized his entire stock of goods, of the value of about \$5,000, and converted the same to their own use, and thereby broken up his business, and deprived him of the means of paying his just debts; that he arrived at the age of twenty-one years on the 14th of May, 1872; that he now ratifies and confirms the said four debts (naming them, but not including that to Barton, Alexander & Waller), and also ratifies and confirms the proceedings in bankruptcy herein, and the adjudication and proceedings thereunder; that he has been and is willing to surrender his estate and effects for the benefit of his said creditors, and desires to obtain the benefit of the bankruptcy Act; that the said four creditors are all the creditors who have proved claims against him in the bankruptcy proceedings; and that he has no property except that which was taken possession of by Barton, Alexander & Waller, and had no other property at the time the petition of Stevens was filed. He therefore prays that the proceedings in bankruptcy, commenced on the petition of Stevens, may be continued, perfected and carried through, and that he may be decreed to have a discharge from his debts.

In answer to this petition of Derby, it is stated, on the part of Barton, Alexander & Waller, by affidavit, that they did not take possession of the goods of Derby, but that Derby, on the 17th of November, 1871, before daybreak, carted away from his store his entire movable stock, leaving only the fixtures and some rubbish, and has ever since retained said goods and concealed himself from said firm; and that the removal of the goods took place in the presence of three policemen, who knew Derby, and did not interfere because they knew him to be the proprietor of the store.

On the part of Barton, Alexander & Waller, it is contended, that, as Derby was an infant when he contracted the debt to Stevens, there was no provable debt due to Stevens at the time of the adjudication, and the proceedings in bankruptcy were unauthorized; that the mortgage to Barton, Alexander & Waller was void because of the infancy of Derby at the time it was given, and, therefore, Derby committed no act of bankruptcy by giving it; that Derby, by the suit in the State Court, which is still pending, repudiated the mortgage; that he still repudiates it and the debt secured by it, by disowning it in his petition, and not therein ratifying and confirming it; that, as no title passed to Barton, Alexander & Waller by the mortgage, they obtained thereby no preference; that the petition merely ratifies the four claims proven during the infancy of Derby, for the purpose of a discharge therefrom, and such ratification does not amount to a promise, since he became of age, to pay such debts, so as to create a liability therefor, on which suits could be brought; that the claim of Barton, Alexander & Waller is as just and fair a claim as any one of the other four; that the adjudication was void on the grounds, (1) that there was no debt due to Stevens at the time of the adjudication; (2) that the act of bankruptcy alleged in the petition of Stevens was not committed; (3) and that the Court obtained no jurisdiction of the person of

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Derby; that the void adjudication cannot be rendered valid by any subsequent consent or ratification by Derby; and that Derby, if he wishes to become a bankrupt, must now petition in the usual way.

On the part of the assignee and of Stevens, it is urged, that, if these proceedings are dismissed, all remedy against Barton, Alexander & Waller, under proceedings in bankruptcy, is, by lapse of time, gone; that, if necessary, the proceedings should be allowed to be amended, by having a guardian *ad litem* appointed for Derby *nunc pro tunc*; and that there is nothing in the language of the bankruptcy Act of 1867 that forbids its application to an infant, and its language is broad enough to cover the case of an infant.

I entertain no doubt that Barton, Alexander & Waller are in a position to entitle them to ask the interposition of this Court to vacate the adjudication. The fact of the pendency of the suit in this Court brought by the assignee against them, and the fact that they are as fully creditors of Derby as are those who have proved their debts against him, except in the particular that they have not formally proved their debt, give them an interest to protect, which brings them within the principles laid down in *In re The Boston, Hartford & Erie R. R. Co.* (9 *Blatchf. C. C. R.* 101), and demands that the Court should, at their instance, inquire whether the adjudication in this case can be sustained.

The word "infant" or "minor" is not found in the bankruptcy Act. The language of the 39th section, "any person residing and owing debts as aforesaid," which refers to the 11th section, and the language of the 11th section, "any person residing within the jurisdiction of the United States," is broad enough to include an infant. So, the language of the 103d section of the insolvency law of Massachusetts (*Gen. Stat. of Mass. of 1860, chap. 118*), authorizes involuntary proceedings against "any person," not mentioning infants by words

of inclusion or exclusion. In the case of *Farris v. Richardson* (6 *Allen*, 118), a minor had been put into insolvency by some of his creditors, by default, on a notice left at his last and usual place of abode, it not being made known to the judge of insolvency that he was a minor. He had obtained credit from the petitioning creditors on the strength of representations that he was of full age. A creditor of his, who held promissory notes of his, and had attached his property thereon, before the insolvency proceedings were commenced, brought a bill in equity, to restrain such proceedings, against the judge, the messenger and the petitioning creditors. The Court held the proceedings to be void, on the ground that they had been prosecuted without the appointment of any guardian *ad litem* for the infant. It says: "In the absence of any express legislative enactment, or some clear implication arising from an existing provision of law, we cannot sanction proceedings in their nature judicial, which involve so wide a departure from the principles and practice on which civil suits against infants are uniformly conducted in Courts of law." But it abstained from deciding whether the provisions of the insolvent laws of Massachusetts were at all applicable to infants, even when duly represented by a *prochein ami* or a guardian *ad litem*. It suggests, however, that there is fair reason to doubt whether the Legislature intended to include infants among those entitled to the benefit of or subject to the duties and limitations created by, the insolvent laws.

It cannot be doubtful that an adjudication against an infant who does not appear by a guardian *ad litem*, cannot be upheld. It is an adjudication against a person who has no legal existence, so as to be proceeded against in a Court as if he were of full age. He is called upon to show cause, when he cannot, by himself, be heard to do so.

It is supposed, however, that this is a matter personal

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to the infant, and that the defect is cured, if the infant, after he becomes of age, comes into Court and waives the irregularity by ratifying the proceeding; or, that the defect may be cured by the action of the Court now, under such ratification, in appointing a guardian *ad litem* for the infant, for the time of his infancy, *nunc pro tunc*, as of the return day of the order to show cause. It will not be necessary, in the view I take of this case, to discuss the question thus suggested, for I am of opinion that infants, as subjects of either voluntary or involuntary bankruptcy, are not embraced within the provisions of the Act of 1867, at least, in respect to their general contracts.

I have not been referred to any decision on the subject under the present Act. Under the Act of 1841, it was said by Judge McLean, in *In re Book* (3 *McLean*, 317), that that Act extended to infants. The report of that case is very meagre, and throws little light on the question.

The general contracts of an infant having no force, if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for, the whole proceedings must be in vain, if the debts are disaffirmed by him after he attains his majority. And it does not comport with the proprieties of a Court of justice, that it should solemnly entertain proceedings brought by an infant bankrupt voluntarily, with the surrender of his property to the Court, and its granting of protection thereon, and its injunctions against pending suits, and then permit him afterwards to demand the restoration of his property and the virtual dismissal of the proceedings, against the will of the creditors set forth in his schedule, and who have suffered, perhaps, from the effect of the injunctions of the bankruptcy Court, on the ground that, having arrived at full age, he disaffirms the debts so set forth.

So, in an involuntary case, the property of the infant bankrupt would be taken by the Court, injunctions would, after adjudication, be granted against pending suits, a schedule of his creditors would be furnished by the bankrupt, and their debts would be proved, to no purpose, for, his disaffirmance of the debts, after becoming of age, would necessitate the restoration to him of his property, without any relief to the creditors.

But there are other difficulties attendant on an involuntary case. The debt of a petitioning creditor must be a debt provable at the time the petition is filed. A debt arising out of a general contract by an infant cannot be said to be a provable debt, or a debt at all, within the 19th section of the Act, or to be a contingent debt, within that section. In the case of a contingent debt, the party is absolutely bound by the obligation into which he has entered, but, by its terms, the debt is not to be paid except in a certain contingency. An infant is not absolutely bound by the obligation into which he has entered. So, also, in an involuntary case, the act of bankruptcy must be one which the party was capable at the time of committing absolutely, and did commit absolutely. An infant cannot make an absolute valid transfer of his property, within section 39, and, although he may be capable of committing some of the other acts of bankruptcy specified in that section, it is not to be intended that Congress designed to make any of the specified acts of bankruptcy applicable to a person who could never absolutely commit the one involving a transfer of property. All the acts are specified in the same general language, which is broad enough to include all persons, including infants, and persons *non compos mentis*, and those under other legal disabilities; but it ought not to be construed as including, in respect to any of the specified acts, any person who is not in a personal status to be capable of committing absolutely all the specified acts. The law should be construed as uniform in its scope, as to the persons it applies to.

In the Matter of Walter S. Derby, a Bankrupt.

Another difficulty would arise in respect to infants. By the 43d section, at the first meeting of creditors, three-fourths in value may resolve to have the estate wound up by a trustee. If the Court approves, the bankrupt is to transfer all his property to the trustee, who is then to hold it "in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had and held the same if no proceedings in bankruptcy had been taken." What could a trustee do under such a transfer from an infant? He could do no more, in regard to disposing of the property, during the minority of the infant, than the infant himself could have done. Every proceeding would have to be suspended, to await the action of the infant, on his becoming of age, and the creditors would be prevented from going on with any proceedings in any tribunal.

It cannot be supposed that Congress intended that the jurisdiction of the bankruptcy Court, or its effective procedure, should thus depend on the future personal action of the subjects of its process. It is not perceived why an infant could not rightfully ask, at least, in an involuntary case, if not in all cases, that the Court should suspend all allowances of proofs of debt, and all distribution of his property, until he should become of age, and be allowed the privilege of disaffirming the debts sought to be proved. If he should disaffirm all of them, he could receive his discharge, and have all his estate returned to him. The only action of the Court in such a case would have been to preserve his property for him, and give him a discharge from debts in respect to which, if sued, a plea and proof of infancy would have been fully available to free him from liability. It is not supposable, in the absence of express directions to that effect, that Congress intended that the bankruptcy Courts should exercise such a jurisdiction in respect to the estates of infants.

For these reasons, I am of opinion, that Derby, hav-

ing been, in fact, an infant, when adjudicated a bankrupt, was not a proper subject for the action of the Court, for want of authority in the Court to take cognizance of his case. The question is one of jurisdiction. Therefore, the fact that Derby now comes into Court, and states that he ratifies and confirms the proceedings, can have no effect to give to the Court authority and jurisdiction as of the time of the adjudication (*In re Lady Bryan Mining Co. 2 Abbott's U. S. Rep. 527*).

But, even giving full effect to Derby's present petition would not help the case. The giving of the mortgage to Barton, Alexander & Waller was no act of bankruptcy, because it was not an absolute transfer. It was subject to his election to affirm or disaffirm it when he became of age. His present petition contains no affirmance of the mortgage, and cannot be otherwise regarded than as a disaffirmance of it. A general confirmation and ratification of the adjudication cannot, in view of the whole petition, be construed as an affirmance of the mortgage which was the basis of the adjudication. It was not so designed.

It is not intended to express any opinion as to whether an infant may or may not voluntarily petition in respect of contracts for which he is liable, such as debts for the value of necessities.

The present petition of Derby cannot be received as a proper voluntary petition, as its prayer merely is, that the former proceedings may be continued and carried through. As it can have no retroactive effect, an order must be entered vacating the adjudication herein, and all the proceedings had thereupon.

Samuel Brown, for Barton, Alexander & Waller.

Levi Gray, for Stevens and the assignee.

The Steamship Java.

NOVEMBER, 1872.

THE STEAMSHIP JAVA.

COLLISION AT SEA.—STEAMER AND BARQUE.—SPEED.—LIGHTS.—
'LOOKOUT.—EVIDENCE.

On the night of August 25th, 1871, the Norwegian barque *Anitas* was sunk by a collision with the steamer *Java*, at sea. Of the twelve persons on board of her, only one was saved, and he was below, and did not come on deck till after the collision. The steamer was going at the rate of ten knots an hour, and the night was dark, with a drizzling rain. The weight of the evidence for the claimant, however, was, that the hull of a vessel could be seen a quarter of a mile. The lookout on the steamer saw a white light about a point on her starboard bow, which, he said, disappeared, and he then saw a good red light. The engine of the steamer was stopped and reversed, but she struck the barque stem on, on her port side, a square blow :

Held, That, if the night was a thick night, with a drizzling rain, the speed of the steamer was too great; and if, on the other hand, the hull of a vessel could have been seen a quarter of a mile, and the steamer could be stopped in less than a quarter of a mile, then the steamer failed to see the barque as soon as she ought to have been seen ;

That the steamer had failed to establish that the barque did not have a red light set, or changed her course improperly, which was the only fault she alleged against the barque, and she was, therefore, solely liable for the collision ;

Where a vessel is found to have been in fault in a collision, especially where, as here, the effect of the collision was to destroy all the persons on the other vessel who could have given evidence as to her lights, clear and satisfactory proof is required of the absence of such lights, to inculpate such other vessel in reference to the lights.

BLATCHFORD, J. On the night of the 25th of August, 1871, shortly before half past 10 o'clock, the steamer *Java*, while on a voyage from Liverpool to New York, came into collision, in the Atlantic ocean, with the Norwegian barque *Anitas*, striking, with her stem, the port side of the barque, a square blow, and cutting her into two parts, so that the steamer passed between such two parts, and they sank almost instantly. The barque was in ballast, on a voyage from Portsmouth, England, to Miramichi, New Brunswick. Of the twelve persons

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composing her crew, eleven were lost. The survivor was asleep below, and was awaked by the noise of shouting from the deck of the barque, and hurried on deck, only to arrive there after the blow, and to find the vessel sinking under him. He was saved by swimming, and was picked up by a boat from the Java. He is a witness for the libellants, and their only witness. All he can tell is what is told above. The night was dark, there was a drizzling rain, the wind was southwest, or more westerly, and the Java was heading west north-west, with the wind and sea on her port bow, and a cross sea from the northwest, the remnant of a wind from that quarter. The sea was heavy, and the Java was pitching a great deal. The barque was on her starboard tack, and was crossing the course of the Java. The speed of the Java at the time was about ten knots an hour. The libel alleges fault in the Java, in not keeping a proper lookout, in not seeing the barque and her lights, in proceeding at too great a rate of speed, and in not in time taking steps to avoid the barque. The answer alleges, that the Java had two proper lookouts, properly stationed, and attentive to their duties, but that the barque was not visible until less than a minute before the collision, when one of the lookouts discovered and reported a faint white light nearly right ahead; that such light almost immediately disappeared, and a red light was seen in its place; that thereupon the helm of the Java was put hard a-port, and her engines were stopped and reversed, but she struck the barque; that the barque was sailing without any colored lights; that, just before the collision, she improperly changed her course, to cross that of the Java; that she did not discover the Java until just before the accident, when she first exhibited the white light, and then the red light, which were seen by the Java as soon as they were exhibited; and that the collision was caused exclusively by the want of good management of the barque.

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It was the duty of the steamer to avoid the barque, or to show a satisfactory excuse for not doing so. It is in proof that the steamer was being driven against the wind and the sea, and at as great a speed, it is clear, as she could make against them. Some of her witnesses say that there was a drizzling rain, and one of the lookouts says that it was misty, a pretty thick night, small thick rain. If this were so, her speed was too great, as, at a less speed, there would have been more time, after her discovery of the barque, to take steps to avoid a collision. If, on the other hand, as is the weight of the evidence on the part of the claimants, the hull of a vessel could be seen a quarter of a mile, on that night, irrespective of any lights on her, so as to make the speed of the steamer not excessive, and if, as the testimony is, the steamer could, at her then speed, and with the sea as it was, be stopped in less than a quarter of a mile, it follows inevitably, that the steamer failed, for want of a proper lookout, to see the barque as soon as the barque could and should have been seen.

Was the barque in fault? It is claimed that she had no red light set, and that, just before the collision, and on discovering the steamer, she exhibited first a white light and then a red light. Only two persons on the steamer saw any light on the barque. One of them, Groom, a lookout, says, that the first he saw of the barque was "a small dim light, a common white light," bearing about a point on the starboard bow of the steamer; that he reported this light as soon as he saw it; and that the white light disappeared, and then he saw a red light, "a good red light." The second officer heard the report of the light, and, looking, saw a red light, "clear and distinct," bearing "nearly right ahead, a little on the starboard bow." He says, that, after that, and before the collision, he saw the barque, but the light was not visible; and that it was less than three-quarters of a minute from the time he discovered

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the light until the collision. On this evidence the Court is asked to hold that the barque had no red light set and burning. The man who was saved from the barque gives no testimony as to the presence or absence of lights on the barque at or before the collision, and does not appear to have been interrogated on the subject by either side.

Where a vessel is found to have been in fault, in a collision, especially where, as here, the effect of the collision was to destroy all the persons on the other vessel who could give testimony as to the condition of the lights on such other vessel, clear and satisfactory proof is required of the absence of such lights, if the want of them is relied on as inculcating such other vessel. That the barque showed a red light, a good red light, clear and distinct, is proved. It is supposed that she first showed a white light, and that the red light she showed disappeared before the collision, and hence it is argued that she had no red light set on her port side. But the evidence is not sufficient to show that what the single witness thought to be a white light was not the red light, at a greater distance, and that it did not disappear with the movements of the two vessels in the heavy sea, and then reappear, to be seen by both men as a good, clear, distinct red light. It is not testified that the two lights were seen at the same time. As to the final disappearance of the red light before the collision, which fact the second officer alone testifies to, when it is considered that, from the time he first saw it until the collision was less than three-quarters of a minute, and that, during that interval, he telegraphed to stop the engine, and also telegraphed to port the helm, and gave a verbal order to port, and that there must have been excitement and alarm, the conclusion that what he saw was not a set red light is not warranted. When to all this is added the fact that the persons observing this light were on the bridge, some distance in rear of the bows of the steamer, with the two vessels approaching

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each other, and the possibility of the interception of the view from the position on the bridge, it is not satisfactorily established that the red light seen was not the properly set red light of the barque. It was not sooner seen, either because the lookout was inattentive, or was in an improper place for good observation, being on the bridge, or, if in a proper place for observation, did not see it soon enough, because, in view of the weather, the steamer was going too fast.

As to the allegation that the barque changed her course to cross the course of the steamer, there is no evidence to support it. There is nothing to show that she was not sailing as close as she could to the wind, while beating, and pursuing her voyage.

There must be a decree for the libellants, with costs, and a reference to a commissioner to ascertain the damages.

Beebe, Donohue & Cooke, for the libellants.

Daniel D. Lord, for the claimants.

NOVEMBER, 1872.

JAMES H. MORAN, AS ASSIGNEE IN BANKRUPTCY OF THE COLUMBIAN METAL WORKS, v. DAVID STRAUSS *et al.*

**MORTGAGE BY CORPORATION.—REAL AND PERSONAL PROPERTY.—
CONSENT OF STOCKHOLDERS.**

A corporation, incorporated under the general manufacturing law of the State of New York, executed a mortgage on real and personal property, and an assignment of two patents, as security for moneys due to the mortgagees from the com-

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pany. The consent of two-thirds of the stockholders to the mortgage of the real estate was given. The holder of seventy-five shares, whose signature made up the two-thirds, had bought them at a sale ordered by the board of trustees, the stock having been held by two of the trustees, for the benefit of the stockholders. The purchaser of the shares at this sale, which was on credit, was a trustee. The sale was approved by the board. The assignee in bankruptcy of the company filed a bill to set aside the mortgage and assignment: *Held*, That the mortgage was consented to by two-thirds of the stockholders, and its consideration was advanced in good faith;
That no consent was necessary to the mortgaging of the personal property, or the assignment of the patents;
That the mortgage and the assignment could not be set aside, but must be regarded as security for the moneys due from the company to the defendants at the time, and moneys advanced by the defendants on the faith of them.

THE plaintiff in this action filed this bill to set aside a mortgage. The bill alleged that, on March 19th, 1869, the Columbian Metal Works filed a petition in voluntary bankruptcy, and were adjudged bankrupt, and the plaintiff was appointed assignee; that the bankrupts were a corporation incorporated under the general manufacturing law of the State of New York, and were the owners of real estate in Morrisania, New York, and also of personal property, among which were two patents; that, on August 30th, 1867, they executed to the defendants a mortgage on all the real and personal property, except the patents, and also assigned to them the patents; that both the mortgage and the assignment were void under the laws of New York; that the money purporting to be the consideration of them was not paid, and the company was insolvent, and the written consent of the stockholders owning two-thirds of the stock was not obtained, inasmuch as seventy-five shares, purporting to be owned by one Freeman, one of the trustees of the company, who gave his assent to the mortgage, really belonged to the company; that the defendants had foreclosed the mortgage by suit in a State Court, in which the company had allowed a decree to be entered.

The defendants answered, denying in substance the allegations of the bill, except as to the facts of the bankruptcy, the execution of the mortgage and assignment, and the decree of foreclosure.

For complainant, *W. H. Arnoux.*

For defendants, *J. M. Van Cott.*

BLATCHFORD, J. In this case I have arrived at the following conclusions :

(1.) The petition in bankruptcy having been filed March 19th, 1869, the title of the assignee relates back to that date, and the decree of foreclosure made on the 26th of March, 1869, in a suit to which he was not a party, is of no effect to prejudice his rights.

(2.) If the mortgage was unauthorized and void, as being *ultra vires*, it was such a fraud on the general creditors of the corporation, that the plaintiff can impeach it.

(3.) The holders of two-thirds of the stock consented to the mortgage. The 75 disputed shares belonged to Pirsson, as surviving trustee. They had been originally lawfully issued as full paid stock, and passed from the parties to whom they were issued, and went into the hands of Pirsson and Freeman, as trustees, as working capital, for the benefit of the stockholders, to be disposed of under the direction of the board of trustees, in such manner as they should deem for the best interests of the company. Freeman had died. A sale of the 75 shares, on credit, to H. O. Freeman, was a lawful sale. It was approved by the board. It was made in good faith, according to the testimony. Even if the 75 shares could not be represented by H. O. Freeman, the consent of Pirsson, and of the other four members of the board of trustees was given to the mortgage, and so the 75 shares, as represented by Pirsson, or by the individuals composing the board, must be counted among the consenting shares.

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(4.) The defendants, at the time the mortgage was given, owned only 28 shares, not enough to make the two-thirds, if the 75 shares be excluded.

(5.) The consideration of the mortgage, so far as appears, was advanced by the defendants in good faith, and went to the uses of the corporation.

(6.) The mortgage is not impeached as being in violation of the bankruptcy Act.

(7.) Construing the consent as applying only to a mortgage of the real estate, no consent was necessary to enable the corporation to mortgage the personal property, or to assign the patents. The mortgage did not cover the patents. They were assigned by a separate instrument, and, even though it be taken that they were really assigned only as security, yet the corporation had power by law to convey its personal property, which power includes the power to mortgage, or to transfer as security. A mortgage is none the less a conveyance because it is defeasible. The greater includes the less, unless the less is expressly excluded.

(8.) The suit to set aside the mortgage wholly cannot be maintained, but it must be regarded as, together with the letters patent assigned, a security for such moneys, if any, as the corporation owed the defendants when the mortgage was given, and such moneys as the defendants paid for or advanced to the corporation on the faith of the mortgaged property and the patents. If it be doubtful whether such moneys, with interest, exceed the proceeds of the mortgaged property and of the patents, the amount due to the defendants must be ascertained on proof.

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NOVEMBER, 1872.

THE SCHOONER OCEAN BELLE.

JURISDICTION.—RIGHTS OF MAJORITY AND MINORITY SHIPOWNERS.—
POWER TO SELL.—BOND FOR SAFE RETURN.

- A Court of Admiralty has no power to decree a sale of a vessel, at the instance of the owners of a minority interest, except, perhaps, as the result of the failure of the owners of the majority interest to give security for the safe return of the vessel.
- A Court of Admiralty has power to decree a sale, in case of a dispute between owners of equal moieties, as to the employment of the vessel.
- A Court of Admiralty has no jurisdiction in matters of accounting between part owners of a vessel.
- A Court of Admiralty cannot require the owners of a majority interest in a vessel to give a bond to the minority interest to cover indebtedness of the vessel to the minority owners, or to indemnify them against loss in her future employment.

BLATCHFORD, J. The libel in this case, filed in December, 1869, styles itself a libel "in a cause of possession and sale." It prays for no process against the vessel or against any person. On the filing of the libel, a monition commanding an attachment of the vessel was issued. Under it, the vessel was attached. A claim to the vessel was filed on behalf of the owners of eleven-sixteenths of her. She was discharged from arrest, on a bond in the sum of \$4,500, conditioned to abide the decree of the Court.

The libel states, that it is brought against the vessel, and against all persons lawfully intervening for their interest in her, and especially against Richards, Adams & Co., owners of two-sixteenths of her; that the libellants are the owners of five-sixteenths of her, having owned four-sixteenths since the 30th of December, 1864, and one-sixteenth since the 3d of November, 1865; that they bought the four-sixteenths when she was new, and paid for it a proportional part of \$14,000, and that they paid

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for the one-sixteenth a proportional part of \$12,000; that, by mismanagement, she has depreciated in value; that, although, since December, 1864, nearly \$4,000 of repairs have been put upon her, she is not now worth more than \$6,500; that her depreciation is also due to the fact that she has been controlled by parties who now have but a nominal interest in her, and who have never owned more than two-sixteenths of her, and to the fact that her owners have always been at variance as to what voyages she should make, who should command her, and what repairs, if any, should be put upon her; that, for the past three years, from year to year, she has lost money to her owners; that, in no one year during the past three years, has she earned enough, over and above expenses, to pay interest, to say nothing of necessary insurance; that, during the year 1866, the libellants advanced considerable money to pay her expenses; that, in September, 1866, they paid for her repairs, when she put into Newport in distress, and have never been repaid therefor; that she is now unfit for sea, requiring to be refitted as to her sails and rigging, and to have other repairs, at a cost of not less than \$2,000; that their interest in the vessel, bought for \$4,250, is not worth more than \$2,000, and they have offered to sell it to Richards, Adams & Co. for that sum, which offer has been refused; that the value of the vessel is every day depreciating; that, for five years, she has made but one or two successful voyages; that, under her present ownership and management, she never will make successful voyages; that, unless this Court shall intervene to protect the libellants, their whole interest will quickly be lost to them; that they have frequently offered their co-owners either to buy or sell, on the same terms, whether as buyers or sellers, but no result has been reached, or can be; that the ownership of the vessel is, the libellants five-sixteenths, which is the largest belonging to any single individual or firm, one Emery, formerly master of

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the vessel, three-sixteenths, one Farwell, one-sixteenth, one Locke, one-sixteenth, one Barnes, one-sixteenth, one Caldwell, one-sixteenth, one Nickerson, two-sixteenths, and Richards, Adams & Co., ship's husbands and agents of the vessel, two-sixteenths, but only nominally, they having transferred it to another; that the vessel is about to sail on a voyage, but whither the libellants do not know; and that they have protested against her further use and employment.

The prayer of the libel is for a decree, that the vessel be sold, for the benefit of her creditors and owners, the proceeds to be applied, first, to the payment of all her just debts, and the balance to be then distributed among her owners; that, until such decree and sale, the libellants be given possession of the vessel, to be used by them prudently and with discretion, they offering to give a bond, in double the amount of the value of all adverse interests in the vessel, to use her with care and prudence, and to render just accounts of all her earnings and expenses, and to do such other things as the Court shall impose, in the condition of the bond; and that, in case the vessel shall be given over to the use and possession of owners other than the libellants, a bond be required of them, in double the value of the interest of the libellants in the vessel, and also in double the further amount of the indebtedness of the vessel to the libellants for moneys advanced, and that such bond shall indemnify the libellants against further loss, and guarantee to them the payment of moneys expended on account of the vessel, such expenses to be assessed by a commissioner of the Court.

The claimants of eleven-sixteenths of the vessel except to the libel on these grounds: (1.) It does not state a cause of action cognizable in this Court; (2.) This Court has no power, under the statements in the libel, to take the possession of the vessel from the claimants, or to deliver it to the libellants; (3.) This Court has no juris-

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diction to order the sale of the vessel to pay her debts ; (4.) The libellants do not set up any facts that entitle them to the interference of the Court. They also answer the libel, taking issue on its material allegations, and praying for its dismissal.

The main prayer of the libel is for a sale of the vessel. There is an incidental prayer, that, until the sale, possession of the vessel be given to the libellants ; and that, if possession be given to the other owners, a bond of a certain character be required from them.

The Court has no power to order a sale of this vessel, on the facts set out in the libel, to pay the debts and distribute the residue of the proceeds, on the demand of the owners of five-sixteenths of her, and against the will of the owners of the rest, except, perhaps, as the result of a failure of the owners of the eleven-sixteenths to give security for the safe return of the vessel. Such power of sale has never been established in this country. A power of sale has been exercised where the dispute was between the owners of equal moieties, as to undertaking a particular voyage or adventure, as in *Davis v. Brig Seneca* (18 *Amer. Jurist*, 486), and in *The Vincennes* (cited in 2 *Parsons on Shipping and Adm.* 343). The power is thus expressly limited by Judge Story, in his *Treatise on Partnership* (§ 439), and in his opinion in *Steamboat Orleans v. Phœbus* (11 *Peters*, 175, 183). In that opinion he says, speaking for the Court : "The jurisdiction of Courts of Admiralty, in cases of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called. The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the Admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all."

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Nor has this Court any power to take the vessel out of the possession of the majority owners, and put her into the possession of the minority owners. As the majority intend to employ her on a voyage, they have a right to select the voyage, and to keep possession of the vessel, while she is employed, subject only to the requirement of giving bond for her safe return, if such bond is required.

The bond asked for by the libel, in case the vessel is left in the possession of the other owners, is one which this Court has no power to require, except so far as the libel may be regarded as asking for a bond for the safe return of the vessel. The Court has no jurisdiction in matters of account between part owners of a vessel (*Steamboat Orleans v. Phœbus*, 11 *Peters*, 175, 182; *Grant v. Poillon*, 20 *Howard*, 162; *Ward v. Thompson*, 22 *Id.* 330). It follows, therefore, that it cannot require the other owners to give a bond to the libellants to cover the past indebtedness of the vessel to the libellants, or to indemnify the libellants against future loss in the employment of the vessel. Besides, such a proceeding would be substantially to permit the libellants to libel the vessel *in rem* for a claim alleged to be due by her to them as owners, and that for a claim the amount of which cannot be ascertained, except as the result of an accounting among all the owners.

The libel does not ask for security for the safe return of the vessel, nor has it any prayer for general relief. The exceptions are allowed, so far as the second and third grounds of exception are concerned. The first and fourth will be allowed, and the libel will be dismissed, unless the libellants shall apply for leave to amend their libel, so as to make it one praying for security for the safe return of the vessel.

E. D. McCarthy, for the libellants.

C. Donohue, for the claimants.

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by the use of such nautical skill as owners of vessels usually employ in such emergencies.

It appeared that a small quantity of coal was raised from the wreck, and appropriated to his own use by the libellants' agent :

Held, That the libellants, and not the claimants, were chargeable with the loss of this coal.

The report of the commissioner reported a certain sum for freight on the cargoes.

The claimants excepted to the allowance of that amount, on the ground that no deduction had been made from the gross freight for the expenses of completing the voyage:

Held, That, as it did not appear from the report how the commissioner arrived at the sum which he allowed, or that he did not make the deduction referred to, the exception would not lie. The report should have been excepted to, as not stating the principle on which the sum was allowed, or a motion should have been made to send the report back for correction.

BLATCHFORD, J. The first and second exceptions on the part of the claimants relate to the barge Reading and her cargo of coal. The first exception is to the allowance of \$2,000 as the value of the Reading at the time of the collision, and is made on the ground that "no proper or suitable efforts to save the said barge, after the collision, were made by the libellants, and there was no evidence showing that she might not have been raised and repaired for a sum less than her value when repaired," and on the ground that "the final loss of the said barge was occasioned by the negligence, fault and improper conduct of the libellants in reference to the same, subsequent to the collision." The second exception is to the allowance of the value of the cargo of the Reading at the time of the collision, on the ground that her cargo "might have been raised and saved for an amount less than its value when saved, and no proper or suitable efforts to raise or save the same were made in behalf of the libellants, and the same was finally lost by reason of the negligence, fault and improper conduct of the libellants, in reference thereto, after the collision."

The allegations of fact contained in these exceptions are not sustained by the evidence. The principle decided in the case of *The Baltimore* (8 *Wallace*, 377), is not

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applicable to this case, on the facts proved. In the case of the *Baltimore*, there was no proof of the fact of a total loss, further than that the vessel sank. The Court said, in that case: "Evidence that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo, unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs were made." It also said that the full value of vessel and cargo cannot be given as damages, on the ground of a total loss, "where, by reasonable exertions, the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies;" that the party injured must employ "reasonable measures" to stop the progress of the damage, and must not "wilfully and obstinately, or through gross negligence," suffer the damage to augment; and that the party in fault for the collision is not liable "for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship."

In the present case, there is much more proof of a total loss than merely that the vessel and cargo sank. The vessel and cargo were not abandoned. Reasonable exertions were made to raise the vessel and save the cargo, by the use of such nautical skill as the owners of vessels usually employ in such emergencies. The exertions were reasonable as to promptness, in view of the fact that the sinking took place in the middle of the month of December. They were reasonable as to character and extent, considering the fact that the sinking was in the swift tideway of Hell Gate. The usual appliances were employed, and the matter was put in charge of persons of competent skill. The result goes to prove

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the fact of total loss, and not the want of reasonable exertion.

The claimants do not appear to have had credit for the few tons of coal which were taken out of the wreck, six to ten tons. It fairly comes within the second exception, as lost by the improper conduct of the libellants. Their agent, after saving it, appropriated it to his own use.

The third exception of the claimants is to the allowance of \$475 10, as and for the freight on the cargoes of the Reading and Pottsville, on the ground that "no deduction has been made from the gross freight on such voyage, for the expenses which would have been incurred by the owners of said barges, in having them towed by the Vim, upon the voyage on which they were engaged at the time of the collision." It does not appear, from the report of the commissioner, how he arrived at the sum of \$475 10, or that he did not make the deduction referred to in the exception. This should appear by his report, before the exception above set forth will lie. The report should have been excepted to, as not stating the principle on which it allowed the \$475 10, and how that amount was made up, or a motion should have been made to send back the report for correction, in those particulars. A report either for a gross sum, or for gross items, should be accompanied by an explanation of the principles on which the sums are given, if it is intended to question those principles by exception. The Court is not called upon to conjecture the principles, by examining the evidence to see what the principles may probably have been. They must be stated in the report. The report must state explicitly whether the deduction referred to was made, or must state facts, as found by the commissioner, from which no other conclusion can be drawn than that he made no such deduction. The proper practice is laid down in the case of *Murray v. The Charming Betsey* (2 *Cranch*, 64, 124).¹

The same view disposes of the fourth exception of the claimants, which is to the allowance of \$80, as and for the towage to be earned by the tug-boat Vim, from the owners of the barge Hoffman, on the ground that "no deduction has been made therefrom, for the expenses which would have been incurred by the owners of said tug-boat in earning such towage." It does not appear from the report how the commissioner arrived at the sum of \$80, or that he did not make the deduction named in the exception.

All the exceptions on the part of the claimants must, therefore, be overruled, save the second one, in the particular above stated, as to which a proper deduction must be made, but the report furnishes no means of stating what the deduction should be.

The first and second exceptions of the libellants Robert and Gladwish are to the effect that the report, in allowing \$2,000 as the value of the Reading, and \$2,000 as the value of the Pottsville, at the time of the collision, ought to have allowed more as the value of the two boats, and ought to have allowed at least \$6,000 as their value. The first and second exceptions of the libellant McWilliams are to the effect, that the report, in allowing \$3,000 as the value of the C. J. Hoffman, at the time of the collision, ought to have allowed more, and ought to have allowed at least \$4,300. An examination of the evidence satisfies me, that the allowance in respect to each of the three boats is sufficient.

The third exception of the libellants Robert and Gladwish is, that the report should have allowed \$594 97, as the net freight on the Pottsville and Reading, instead of \$475 10; and the third exception of the libellant McWilliams is, that the report should have allowed \$179 68, as the net freight on the C. J. Hoffman, instead of \$125 68. As the report does not state whether the items allowed are net freight or gross freight, and, if net freight, how the sums were arrived at, and on what prin-

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principles, and what deductions were made from gross freight, these exceptions present no point for consideration, and are overruled.

T. C. T. Buckley, for the libellants.

C. H. Tweed, for the claimants.

Eastern District of New York.

NOVEMBER, 1872.

GEORGE W. HORTON *v.* BENNET SMITH *et al.*

PILOTAGE.—CHANNEL OF HELL GATE.—TENDER OF SERVICE.

A pilot tendered his services to a vessel to pilot her to New York by way of Hell Gate, the vessel being then to the eastward of Hart's Island. The tender of service being refused, he brought an action against the owners of the vessel to recover half pilotage under the Act of the State of New York of 1865 (*Session Laws of 1865*, page 197.) The respondents excepted to the libel, as not alleging that the vessel was navigating the channel of Hell Gate when the tender was made.

Held, That the Act was applicable to vessels bound to New York, to whom the tender of service was made as far east as Sand's Point, and that the exception was untenable.

BENEDICT, J. This case comes before the Court upon exceptions to the libel. The action is brought by a Hell Gate pilot to recover half pilotage of the owners of the bark David McNutt. The libel alleges that the libellant, a duly licensed pilot, at a point in the East river, on Long Island Sound, to the eastward of Hart's Island, and

in the channel, tendered his services to pilot the bark David McNutt to the port of New York, by way of Hell Gate, which service was refused; that the libellant was the first pilot who offered the service, and the bark was, at the time, bound to New York, by way of Hell Gate, and was a foreign and registered vessel drawing fourteen feet of water. To this libel exception is taken on the ground that it does not appear that the libellant tendered his services in "the channel of the East river commonly called Hell Gate," nor that the bark was "navigating the channel of Hell Gate" when spoken by the pilot. The statute of the State of New York, which fixes the rate of compensation to be paid Hell Gate pilots, in the 6th section provides certain rates of pilotage to be paid Hell Gate pilots for piloting any vessel through "the channel of the East river commonly called Hell Gate," and then, in the same section, declares that "any pilot who shall perform any additional pilotage, besides that of piloting through the channel of the East river commonly called Hell Gate, and pilot the same to Execution Rocks or Sand's Point lighthouse, or who shall board any vessel at or to the eastward of Execution Rocks or Sand's Point lighthouse, in Long Island Sound, on her inward passage through Hell Gate, shall be entitled to an additional compensation of seventy-five cents per foot for every foot of water the vessel may draw." And in section 7 it is provided that "any of said Hell Gate pilots who shall first tender his services may demand and receive from the master, owner or consignee of any vessel, of the burden of 100 tons and upwards, navigating the said channel of Hell Gate, and by whom the same shall have been refused, whether inward or outward bound, one half pilotage for every foot of water such vessel may draw, which half pilotage shall be the one half of the rates of compensation established by the sixth section of this Act."

On the part of the defence it is contended that, by

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virtue of these provisions, the liability to pay half pilotage attaches only to such vessels as are boarded and refuse the pilot, when navigating the channel of Hell Gate; and that, while the libel may be considered to aver a tender and refusal to the westward of Execution Rocks and Sand's Point, it locates the place of tender and refusal to the eastward of Hart's Island, and therefore discloses, on its face, that the vessel was not at the time navigating the channel of Hell Gate, within the meaning of the Act. I cannot agree to the construction of the statute upon which this argument is based. The 6th section, above quoted, provides for pilotage services by Hell Gate pilots at and to eastward of Execution Rock or Sand's Point, and the Act, by its terms, describes a vessel at Sand's Point and bound inward, as on her inward passage through Hell Gate. Moreover, it offers an inducement to pilots to go on board inward bound vessels as far to the eastward as Sand's Point, and it would require clear and positive words to warrant the conclusion, that it was not intended to compensate for services rendered in making a tender at any place westward of that point, as well as for services rendered in piloting the vessel, when the pilot is taken in that part of the Sound. The words "navigating the channel of Hell Gate," where used in the seventh section, do not refer to an actual present navigation of the Gate, but are to be taken as intended to cover any vessel which, approaching the Gate, on a voyage which carries her through it, has reached a point as far to westward as Execution Rock or Sand's Point. Such a vessel is, according to the words of the sixth section of the Act, on her inward voyage through Hell Gate, and is a vessel navigating the channel of Hell Gate, within the meaning of the seventh section. It is unnecessary to go further in this case, and determine what would be the effect of a tender made to eastward of Sand's Point, but it may be remarked, as tending to confirm the

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construction I have given to the statute under consideration, that it is the policy of most pilot laws to induce the pilots to make an early tender of their services to inward bound vessels. The ordinary provision, therefore, is, that extra compensation shall be given if the tender be made as far out as a designated line, without fixing any limit beyond which an effective tender may not be made. (See the statutes of New York, and also those of Massachusetts.) State boundaries have been sometimes considered as furnishing the outward limit (1 *Daly*, 185), although Sandy Hook pilots are sought for, and their services taken, much farther out than a marine league. In France it has been adjudged, in regard to vessels bound to Havre, that the pilots may board such vessels at any time or distance out, and the liability to take a pilot has been adjudged to attach to a French ship although she was at the time in English waters, as at the Downs (*Cour. Cass. D.* 1866, p. 303, *Caumont, Traité Pilote*, 31). The present case does not, however, call for any determination as to the effect of a tender made to eastward of Sand's Point, and no opinion is expressed as to the law of such a case. Here the tender was made to westward of Sand's Point, where simple pilotage would have been due if the pilot had been taken, and for the tender which was so made half pilotage is due. The exceptions are overruled, and a decree will be entered in favor of the libellant, with liberty to answer within ten days, on payment of costs of the hearing.

For libellant, *F. A. Wilcox.*

For respondent, *Benedict, Taft & Benedict.*

NOVEMBER, 1872.

IN THE MATTER OF THE PETITION OF
WILLIAM FOSTER.

MORTGAGEE.—RENT OF MORTGAGED PREMISES.—TAXES.—LIEN.

An assignee in bankruptcy received, as property of the bankrupt, real estate subject to mortgages, and collected rent due on a lease of the same made by the bankrupt. Proceedings were taken to foreclose the first mortgage, in which a decree was had, and the property sold and bought by the second mortgagee. The taxes on the property were paid by the second mortgagee out of his purchase money. He then petitioned the bankruptcy Court to direct the assignee to pay him the amount of the rent and of the taxes, out of the bankrupt's estate:

Held, That there was no ground on which he could claim either the rents or the taxes.

THIS was a petition by William Foster for an order that the assignee of James F. Rhodes, a bankrupt, pay to him the amount of certain rents collected by the assignee, and of certain taxes paid by the petitioner. The petition set forth that, when Rhodes became a bankrupt, he was the owner of certain real estate which was subject to a mortgage to one Pearless, and a second mortgage to the petitioner; that the assignee had collected rents for the premises due on leases executed by Rhodes for a period subsequent to the adjudication in bankruptcy, and to the becoming due of the petitioner's mortgage; that a suit was commenced to foreclose the Pearless mortgage, and a decree entered in that suit, under which the premises were sold and were bought by the petitioner, who received a small sum on his mortgage out of the surplus moneys arising out of such sale; and that he had paid the taxes on the premises out of the purchase moneys. The petitioner claimed to have an equitable lien on the premises and on the rents, and

In the Matter of the Petition of William Foster.

prayed for an order that the assignee be directed to pay them to him.

For the petitioner, *Jesse Johnson*.

For the assignee, *Wm. W. Bliss*.

BENEDICT, J. I do not at present see how any proceeding, no matter when taken, can entitle a mortgagee to collect the rents of mortgaged property, which had passed into the possession of an assignee in bankruptcy before the rents became due.

An application by a mortgagee for the appointment of a receiver to collect, for his benefit, rents of the mortgaged premises accruing during the pendency of a foreclosure suit is not based upon any absolute right.

It is, in legal effect, a proceeding to acquire immediate possession of the mortgaged premises, and it may be defeated by the intervention of superior equities, or by the collection of the rents by the mortgagor.

It is addressed to the discretion of the Court; when granted, the rents secured thereby arise from the possession of the property at the time the rent became due, such possession being acquired by means of a receiver.

But if some proceeding, intended to divert the rents from the hands of the assignee, could avail when taken in time, it seems clear that there remains no ground on which to base a claim like the present, where a second mortgagee petitions to be paid rents which, before the filing of his petition, had been collected by the assignee in bankruptcy, as owner in possession of the mortgaged property at the time they became due. Moneys so collected by an assignee in bankruptcy are assigned by the law to be distributed equally among all the creditors, unless shown to be subject to some prior specific lien.

It has been claimed that the petitioner has a specific lien upon these rents by the terms of the mortgage, which contains, as part of the description, the words

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"together with all, and singular, the tenements, hereditaments and appurtenances thereto belonging, and the reversion, remainder, rents, issues and profits thereof."

This is the usual form of a mortgage; these words are intended simply to give a full description of the property; they do not entitle the mortgagee to collect the rents, nor do they create a lien upon rents accruing and collected before the possession of the property passes away under foreclosure proceedings.

The petitioner also prays that the assignee be directed to pay him the amount of certain taxes upon the mortgaged property, paid in course of the foreclosure proceedings taken by a prior mortgagee, whereby the surplus was by so much diminished to the detriment of the second mortgage held by the petitioner.

But I see no principle by which the rents in the hands of the assignee can be held to be charged with the taxes so paid.

The prayer of the petition must therefore be denied.

Southern District of New York.

DECEMBER, 1872.

IN THE MATTER OF WILLIAM MANNHEIM, AN ALLEGED BANKRUPT.

SUSPENSION OF COMMERCIAL PAPER.—BONA FIDE DEFENCE.

M., who was a man of large property, refused to pay a note which he had made, being advised by counsel, and believing, that he had a valid defence against it. A suit was thereupon brought against him, in a State Court, by the holder of the note; and, while that suit was pending, the holder of the note filed a petition against M. in involuntary bankruptcy, alleging that he had suspended payment of the note for fourteen days:

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Held, That the case was not a proper one for an adjudication of bankruptcy, and that the petition must be dismissed.

BLATCHFORD, J. I do not think this is a proper case for an adjudication. The sole act of bankruptcy alleged is the suspension of payment, for fourteen days, of the promissory note held by the petitioner. It is shown that the alleged bankrupt is a man of large property; that he has not suspended payment of his debts and his commercial paper generally; that he is engaged in prosecuting a regular business wholly unconnected with the transactions in respect to which the note was given; that he failed to pay the note because he was advised by counsel, and believed, that he had a good defence to it, on the ground that he had never received any consideration for it, and that it was passed away by the payee in violation of the agreement under which it was given, and that the petitioner was not a *bona fide* holder of it for a valuable consideration without notice; and that a suit is now pending in the Supreme Court of New York against him, brought on the note, by the petitioner, before this proceeding was instituted, which suit is defended on the above grounds, and is at issue and ready for trial. Under these circumstances, the debtor cannot be said to have suspended payment of his commercial paper, within the meaning of the statute. It was not intended that such a person should be put into bankruptcy. It is not for this Court to try the question of the actual liability of the debtor on the note, and adjudge that there was a suspension of payment of his commercial paper, if such liability existed. The proper forum for the determination of the question as to such liability is the Court in which the suit on the note is pending.

The petition is dismissed, with costs.

S. D. Swards, for the petitioner.

J. D. Reymert, for the debtor.

The Steam Propeller J. L. Hasbrouck.

DECEMBER, 1872.

THE STEAM PROPELLER J. L. HASBROUCK.

TUG-BOAT AND TOW.—DAMAGES.

A propeller having a canal-boat in tow, which had sprung a leak while being towed, cast her off in such a way that she failed to reach a dock, and drifted off into deep water, and sank. She had a cargo of wheat, part of which had been wet by the leak before the boat was cast off. How much was wet was in dispute:

Held, That, as it appeared that the canal-boat could have been put into shoal water near the dock at the time she was cast off, the total loss of so much of the cargo as was then uninjured was occasioned by the negligence of the propeller;

That, on the evidence, 800 bushels of the wheat was then wet and worthless, and that the loss was the value of the cargo, less 800 bushels.

THIS was a libel by the owners of a cargo of wheat on board of a canal-boat, against a steamboat, which had taken the canal-boat in tow to tow her from New York to Poughkeepsie, to recover for the loss of the grain, the canal-boat having been cast off from the steamboat in a leaky condition, at Fort Montgomery, and afterwards having sunk in deep water. The Court held that, for all damages received by the cargo up to the time the canal-boat was cast off, the steamboat was not liable, but was liable for the damages to the cargo occasioned by the sinking of the boat after she was cast off.* To show such damages, the libellants proved the number of bushels of sound wheat shipped at New York, and the master of the canal-boat testified, that, at the time the boat was cast off, there was three feet of water in her hold forward, and only three inches aft, and that a space three feet deep at the bow and three inches deep at the stern would be occupied by 800 bushels of wheat;

* See 5 *Benedict*, 244.

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and the libellants claimed, on this evidence, that only 800 bushels of wheat were wet when the boat was cast off. It had appeared, by the master's evidence on the trial, that, when the boat was cast off, she was about a foot deeper in the water at the bow than at the stern, and had been leaking more or less for several hours. The claimants insisted, on this evidence, that, if the water was three feet deep in the hold at the bow, it must necessarily have been two feet deep at the stern; and that, on such a calculation, nearly half the cargo must have been wet. The commissioner reported that only 800 bushels were wet, and fixed the damages at the value of the whole cargo of sound wheat, less 800 bushels, and \$200 for the value of the 800 bushels of wet wheat. The claimants excepted to the allowance of each item.

For libellants, *C. Donohue*.

For claimants, *R. D. Benedict*.

BLATCHFORD, J. It was proved, on the trial, that the dock at Fort Montgomery is about 300 feet long in the line of the river, and runs out about 70 feet into the river; that, at low water, there is, at the dock, seven or eight feet depth of water; that, at its north end, the dock is out even with the edge of the flats, thus leaving 70 feet of flats between the outer edge of the flats and the land; and that, at the south end of the dock, the flats are sometimes bare. From this evidence, taken in connection with the other evidence given at the trial, it is quite apparent, that the bestowment by the propeller on the canal-boat of proper attention, when the latter was cast off, would have enabled the boat and her cargo to be put on the flats, so as to have prevented her sinking, as she did, out in deep water. The sinking of the cargo in deep water, and its consequent total loss, occa-

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sioned, therefore, such damages as there were to the cargo beyond the damage it had sustained, when the fault of the propeller was committed in casting the boat off, and leaving her without care or attention.

As to the damage which the cargo had sustained at that time, the commissioner reports all of it as undamaged, except 800 bushels of wheat, and that he reports as damaged to the extent of \$1 37 per bushel, its undamaged value having been \$1 62 per bushel. As to the quantity of wheat damaged at the time, the only testimony on either side, which specifies any number of bushels as damaged, is that of Atkins, master and part owner of the canal-boat, and who was on her at the time of the disaster. He gives the data from which he makes out that 800 bushels only were damaged, and no witness testifies that, from his data, his calculation was incorrect. No error in his data is pointed out, to my satisfaction, and his calculation therefrom is not so manifestly incorrect that the Court can, without evidence, set it aside. I do not mean, by saying this, to suggest that it appears to be incorrect at all. I am not satisfied, however, that the 800 bushels of wheat are shown to have been worth anything at the time the boat was cast off. The weight of the evidence is that they were worth nothing. The sum of \$200 must, therefore, be deducted from the report, and the damages must stand at \$12,867 01, and the exceptions on both sides must, in all other respects, be overruled.

DECEMBER, 1872.

**LESTER M. CLARK, ASSIGNEE IN BANKRUPTCY
OF ROSENTHAL *et al.* v. MARCUS MARX *et al.*****VOID ASSIGNMENT.—EXPENSES OF ASSIGNEE.—DEPRECIATION OF
PROPERTY.**

In March, 1869, the firm of R. B. & A., made an assignment to M., of all their property in trust for all their creditors. In April, 1869, a petition in bankruptcy was filed against them, and they were adjudged bankrupts. An injunction was issued against M., to prevent his selling the assigned property. The assignee in bankruptcy commenced a suit against M., to set aside the assignment to him, and compel an accounting by him. In May, 1870, the injunction against M. was modified so as to allow him to sell parts of the property. In May, 1871, on final hearing, a decree was made setting aside the assignment to M., and directing an accounting, which was had. On the report of the master, exceptions were filed by the plaintiff to various allowances to M., as reported :

Held, That the effect of the decree, was to declare the transfer to M. to have been void, and to substitute the title of the plaintiff for any title in M., as of the day of the filing of the petition ;

That M., therefore, could not be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer, or to maintain his title or possession thereunder ;

That, in so far as M. acted with the permission of this Court in making sales of the property, he ought to be allowed such expenses as were necessary and proper in so acting ;

That, as the plaintiff furnished no evidence as to any definite loss or depreciation of the property, by reason of the interference of M. with it, or that its value was greater than the price it brought on sale, the Court could not speculate as to what such loss was.

BLATCHFORD, J. The petition in bankruptcy against Rosenthal, Black & Alexander was filed April 7th, 1869. On the 2d of March, 1869, they made to the defendant Marx an assignment, wherein they declared that they were unable to pay their debts in full, and whereby they transferred to Marx all their property, in trust to convert it into money, and therewith to pay the expenses

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of making and carrying into effect the assignment, and then to pay all their debts in full, if possible, and, if not, then *pro rata*. Marx accepted the transfer and took possession of the property. On the 7th of April, 1869, the usual injunction in involuntary cases was issued and served on Marx. On the 21st of April, 1869, this Court modified such injunction, so as to permit Marx to sell certain fixtures and property, and retain the proceeds thereof to abide the further order of this Court. This suit was commenced on the 4th of November, 1869, to set aside the assignment to Marx, as fraudulent and void as against the plaintiff, and to compel an accounting to the plaintiff therefor. Marx answered the bill, and therein maintained the validity of the assignment, and demanded to be permitted to proceed with the execution of the trusts created by it, and denied the plaintiff's title to the relief asked, and prayed for the dismissal of the bill, with costs. The property transferred to Marx embraced a quantity of cloths and ready made clothing, which continued in his possession, boxed up and unsold, until May, 1870, when this Court relieved Marx from the operation of the injunction in respect to it, so far as to permit it to be sold by him. Proceeds of sales of property were deposited by Marx in the United States Trust Company, under the direction of this Court, and subject to its order, as follows: May 28th, 1870, \$1,325 63, and September 28th, 1871, \$470 87. On the 6th of May, 1871, on final hearing, a decree was made herein, adjudging that Marx should account to the plaintiff for all of said property, and that the plaintiff became vested with it, by operation of law, through his appointment as such assignee, and was entitled to recover it from Marx, and appointing a master to take (1) an account of all the property which passed to Marx; (2) an account of the moneys received by Marx from the property; (3) an account of the property and proceeds remaining in the hands of Marx; (4) a debit and credit

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account, charging Marx with the value of all the property which passed to him, and crediting him the value of so much as had been sold, and the proceeds deposited, under the order of this Court, and with the present value of any property remaining in his hands, and with all sums properly allowable in account to him, as against the rights of the plaintiff.

The master now reports the accounts so taken, and further, that Marx has delivered to the plaintiff all the property which passed to Marx, and the proceeds thereof, except the sums "necessarily expended by him in the collection, care and preservation" of the property, and except the proceeds deposited in the United States Trust Company; that there is no property, nor any proceeds thereof, in the hands of Marx, to which the plaintiff is entitled; that no money is due from Marx to the plaintiff; that the whole value of the property is correctly set forth in the account of Marx; that Marx is not chargeable with any damages or other loss in regard to the property, or its proceeds; that Marx ought to be credited with \$3,015 10, and debited with \$2,540 73, showing a balance due him of \$474 37; and that Marx is not entitled to be allowed the further sum of \$500, claimed by him to be an indebtedness incurred by him in the care and preservation of the property. The plaintiff excepts to the report in respect to each one of 53 items credited to Marx, amounting to \$1,218 60, being all the items credited to him by the master except the two, amounting to \$1,796 50, for moneys deposited in the Trust Company. He also excepts to the report because the master has not charged Marx with any loss or depreciation of the property, by way of damages, for his interference therewith.

By the express provision of the 14th section of the bankruptcy Act, the assignment to the assignee, in its conveyance to him of the title to the property and estate of the bankrupt, relates back to the commencement of

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the proceedings in bankruptcy, which is (§ 38,) the filing of the petition for adjudication, and such title, by operation of law, vests in the assignee as of the time of such filing. The title to the property transferred to Marx, if it was the property of the bankrupts, vested in the plaintiff as of the 7th of April, 1869. The effect of the decree in this case is, to declare the transfer to Marx to have been void, and to substitute, for any title in Marx, the title of the plaintiff, on the ground that, notwithstanding the transfer to Marx, the property still remained the property of the bankrupts, as against the plaintiff, if he successfully challenged such transfer within the time, and on the grounds, prescribed in the bankruptcy Act. While the title of Marx might have ripened into a good title, if it had not been questioned by the plaintiff, yet Marx took such title at the risk of the result of such a suit as this. The transfer to Marx being now adjudged to have been void, he cannot, under such transfer, claim to be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer or to maintain his title or possession thereunder. The result of the litigation, is that he is adjudged to have been in default in not surrendering to the plaintiff the property in question. It ought to have been so surrendered when the assignment to the plaintiff was made, which was July 8th, 1869. In so far as Marx acted with the permission of this Court, given in its orders, in making sales of the property, he ought to be allowed such expenses as were necessary and proper to enable him to so act in compliance with the terms of such orders.

On these principles, there are many items allowed which are inadmissible. The items, in March, 1869, for stationery, cases, 2 days' work, books, stamp, copying schedules, 4 weeks' work, postage, premium on insurance, and cartage, would seem to be not allowable. They all seem to have arisen out of the acting of Marx under the

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unlawful transfer to him. It may be that something ought to be allowed as rent or storage, in respect of the goods, from April 7th, 1869, to July 8th, 1869, but there is no evidence to warrant the allowance of the two items of \$141 66 each, for rent, or of the items of \$150 and \$10, for storage. The items, in April, 1869, for work and preparing stock for auction (the latter being for a sale under the unlawful transfer) cannot be allowed. The items for moving and cartage of fixtures may be allowable, if necessary in respect of the sale of fixtures authorized by this Court. The items which follow thereafter, for insurance, taking care of stock, cartage, repacking stock, camphor, and 4 cases, must be disallowed. The items, in May, 1870, for auction invoices, cartage and labor, 2 days' work, and preparing stock, &c., may be allowable, if necessary in respect of the auction sale of the goods authorized by this Court. The items for copy schedule, copy auction sales and making accounts, do not seem to be allowable. The item of \$250 paid to counsel cannot be allowed. It is stated to have been for services rendered in May 1870, in respect of the sale of the property. It was not a necessary or proper expense of the sale, and a surrender of the property to the assignee, which Marx was at liberty to make at any time, would have rendered that expense, and all other expenses which he incurred after July 8th, 1869, unnecessary.

This case is an illustration of the manner in which estates of bankrupts would be frittered away, if such expenses incurred by wrongdoers in regard to them were to be allowed. Marx receives, as the avails of sales, \$2,540 73. Out of this he claims to retain, as expenses, the \$1,218 60 before named, and \$500 in addition, for the services of counsel in drawing the void assignment and defending it against the plaintiff—in all \$1,718 60, or nearly 70 per cent. of the avails. The master disallowed the \$500.

The plaintiff furnishes no evidence as to any definite

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loss or depreciation of the property by reason of the interference of Marx therewith, or that its value was greater than the price it brought on sale. The Court cannot speculate as to what the loss was. There must be evidence.

The first exception of the plaintiff is so far allowed as to refer the case back to the master for a new report on the principles and views hereinbefore set forth, with leave to either party to put in further testimony, as to any of the items allowed by the master in schedule G. to the report. The second exception is disallowed.

Charles H. Smith, for the plaintiff.

W. A. Coursen, for Marx.

Eastern District of New York.

DECEMBER, 1872.

THE SCHOONER TRAVELLER.

HALF PILOTAGE.—NAVIGATING HELL GATE.

Under the Hell Gate Pilotage Act of the State of New York (*Session Laws of 1847*, p. 85, and of 1865, p. 197), when a vessel in the port of New York has entered upon a voyage, which will carry her through Hell Gate, she is bound to employ the first pilot who tenders his services to pilot her through Hell Gate, or, in case of refusal, to pay him half pilotage—and she is none the less liable to pay the half pilotage, if, for any reason, the voyage through Hell Gate is not completed.

BENEDICT, J. This is an action by Francis Bell, a Hell Gate pilot, to recover half pilotage, brought before

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the Court upon an exception to the libel that it states no cause of action.

The libel avers that the schooner Traveller was a licensed vessel, of over 100 tons burden, drawing nine feet of water, and about to navigate the channel known as Hell Gate, and bound from Hoboken to Portland, Maine; that the libellant discovered the schooner in the North river, at a point off Hoboken, and thereupon put off to and hailed her, and duly offered his services to pilot her through said Hell Gate channel, and was refused, and that libellant was the first pilot so offering to pilot the schooner.

To this averment the objection is made, that it fails to show that the vessel, at the time of the alleged tender, was navigating the channel of Hell Gate, whereas, it is claimed, only vessels so navigating are made liable to pay half pilotage by the 7th section of the Hell Gate pilot Act.

I have had occasion heretofore to consider the effect of the language of the section referred to, in the case of an inward bound vessel boarded to the east of the Gate.

The present is the case of a vessel on the west side of the Gate, and, as said in the case referred to (*Horton v. Smith, ante*, p. 264), so here it is to be said that the words, "navigating the channel of Hell Gate," if considered as intended to limit the effect of the section to vessels which come within this description, do not require the pilot's tender of service to be made while the vessel is in the act of passing the Gate. By reference to other parts of the statute, it appears that vessels, inward bound while as far to east as Execution Rock, are intended to be included within the description of vessels referred to in the 7th section; and, by reference to the subsequent part of the 11th section, it will be seen that vessels outward bound through the Sound, not yet having reached the Sound, are also intended to be included within its scope.

The latter part of the 7th section provides for the liability of vessels under 100 tons burden, and then describes them as "vessels navigating the said channel to and from the port of New York." It is clearly to be seen, however, that the object of the section is to provide for two classes of vessels, namely, those over and those under 100 tons burden, without any design of providing for more than two classes of cases, and distinguishing them by the size of the vessel. The words "navigating the said channel of Hell Gate," used in the first part of the section, must, therefore, be considered as intended, at least, to cover any vessel coming within the description repeated in the latter part of the section, that is to say, navigating to or from the port of New York, and from any part of the port, when on a passage through the Gate.

This construction of the Act derives support from the consideration, that a more narrow construction of the statute would have the effect to prevent pilots from tendering their services to vessels until just as they enter the Gate, a result contrary to the general design of pilot laws, which in most cases aim to secure the services of a pilot at the earliest possible time ; while, understood as I have here indicated, the tendency of the statute will be to furnish a class of vessels, often short handed, with an extra man competent to give efficient aid in the navigation of a crowded harbor, where great care and watchfulness is required, and this without any additional charge upon the vessel, as the amount of pilotage depends on the tonnage and not on the distance to west of the Gate.

My conclusion, therefore, is, that it is no objection to a recovery in this case, that the libel avers that the vessel was, at the time of the tender, in the North river, off Hoboken, that being a point within the port of New York.'

Nor do I attach any weight to the suggestion, that

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the libel omits to aver that the vessel ever in fact passed through the Gate.

Half pilotage becomes due by reason of a tender made to a vessel at the time supposed by the law to require a pilot. If the vessel at the time of the tender was on a voyage bound through the Gate, a subsequent change of voyage, or failure for any reason to attempt to pass the Gate, can have no effect upon the right of the pilot, which became fixed by the refusal of his services.

But I am of the opinion, that in order to recover in this action, it must appear on the face of the libel that, at the time of the tender and refusal, the vessel was engaged in the prosecution of a voyage which would carry her through the Gate. Until such a voyage has begun, the master is not called on to meet the question of the employment of a pilot; but, when he has entered upon such a voyage, and is bound from the port of New York through the Gate, then the law presumes him to be in need of a pilot, and compels him to take the first pilot who offers or pay him half pilotage. The present libel is defective, therefore, in that it fails to show that at the time of the tender the vessel had entered upon her voyage. If the vessel in question, when boarded, was lying at anchor off Hoboken, preparatory to commencing a voyage, and the statement in the libel is consistent with such a state of facts, in my opinion, the libellant cannot recover. The libel must be reformed in this particular before a recovery can be had.

The exception is, therefore, allowed, with liberty to amend the libel, the costs of the claimant upon the present hearing to abide the event.

For libellant, *Wilcox & Hobbs.*

For claimant, *R. H. Huntley.*

In the Matter of John Mansfield and Nathan K. Mansfield, Bankrupts.

DECEMBER, 1872.

IN THE MATTER OF JOHN MANSFIELD AND
NATHAN K. MANSFIELD, BANKRUPTS.

COUNSEL FEES.—SERVICES BEFORE ADJUDICATION.

A petition in involuntary bankruptcy was filed against a firm, an injunction preventing them from parting with any of their property was issued, and a warrant of arrest under the 40th section of the Act was issued against one of the firm. The bankrupts employed attorneys, who applied for a discharge of the arrest, and attended on a reference to ascertain the facts, which resulted in the discharge of the warrant. An adjudication being had, the attorneys prepared the schedule and inventory required by the 41st section. Thereafter they applied by petition to be paid for such services out of the estate.

Held, That, under the circumstances, a moderate compensation for such services would be allowed them.

The proper practice, in such a case, is for the bankrupts to apply to the Court in the first instance for leave to employ counsel.

BENEDICT, J. The petitioners in this case pray for an allowance out of the bankrupt's estate of the amount of a bill for professional services rendered under the following circumstances. An involuntary petition was filed in this Court to have John Mansfield and Nathan K. Mansfield declared bankrupts, and their property administered under the bankrupt Act. At the same time an injunction was issued, preventing the bankrupts from parting with any of their property, and also a warrant of arrest under section 40, against Nathan K. Mansfield. These being served, the bankrupts employed the petitioners as attorneys at law, who applied to the Court for a discharge of the warrant of arrest, and attended at a reference which was ordered to ascertain the facts, and resulted in the discharge of the warrant after the bankrupt had submitted to an examination touching his property. The petitioners, also, upon the adjudication of bankruptcy being made, prepared the schedule of cred-

In the Matter of John Mansfield and Nathan K. Mansfield, Bankrupts.

itors and inventory of the estate, which is required by section 41, and for these services the attorneys now ask to be paid out of the bankrupts' estate. I incline to the opinion that services performed in preparing the schedules and inventory required by section 41 may be considered as having been rendered for the benefit of the estate, in a case like the present, where the employment of counsel was unquestionably necessary. As to the services made necessary by reason of the arrest of the bankrupt, I think they can also be compensated out of the fund in such a case as this is stated to be. The Court was entitled to be aided by counsel on the part of the bankrupt in the examination as to the foundation for the warrant of arrest and its continuance, and the amount of bail to be required. The injunction having deprived the bankrupt of the means to employ counsel, such services may, without injustice, be considered a part of the bankrupt proceedings. They were made necessary by the action of the creditors, and could only be obtained by a resort to the fund. It would have been more proper for the bankrupt to have applied to the Court in the first instance for leave to employ counsel, and such previous application should be insisted on, as a general rule. Here it may be dispensed with, the mode of proceeding being unsettled and no question made as to the propriety and necessity of the services in question. But I must require that it be made to appear that the bankrupt is now without means, and that there is no reason to doubt that he has surrendered all his property to the assignee. It must also be shown that the efforts of the counsel were not directed towards obtaining delay or hindering the bankruptcy proceedings. This being made to appear, I shall feel inclined to allow a moderate compensation for services rendered in preparing the schedules and inventory, and those made necessary by reason of the warrant of arrest.

If not desired otherwise by the assignee, in order to

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save expense, the facts may be made to appear by affidavits, and the extent and value of the services shown in the same way ; but if asked for by the assignee, a reference will be ordered to take proof of the facts.

DECEMBER, 1872.

IN THE MATTER OF PARKER & PECK,
BANKRUPTS.

PREFERRED DEBTS.—TAXES.

Bankrupts occupied land under a lease, in which they covenant to pay the taxes on the land. They failed to pay them, and the lessors paid them :

Held, That the lessors were not entitled to claim the amount of such payment, as a preferred debt, under the 28th section of the bankruptcy Act.

BENEDICT, J. I am of the opinion that the payment by the petitioners of taxes and assessments on their own land gives them no right to claim that amount out of the bankrupt's estate as a preferred debt under section 28 of the bankruptcy Act, notwithstanding the fact that the bankrupts were the occupants of the land under a lease in which the lessee covenanted to pay a yearly rent, and "all such taxes, water rents and penalties as shall during said term grow due and payable out of said demised premises." The failure by the lessee to perform this covenant gave the lessors a right of action from the breach thereof, and nothing more. The prayer of the petitioners that their demand be declared entitled to be paid out of the estate of the lessee, in preference to the other creditors, must, therefore, be denied. Upon being properly proved, their demand is, however, entitled to share with the other creditors of the lessee in the distribution of his estate.

DECEMBER, 1872.

THE BRIG BELLE.

PLEADINGS.—SEAMAN'S WAGES.

An admission, in the answer to a libel for seaman's wages, that the seaman shipped for the voyage and performed the service described in the libel, though coupled with a denial that any amount is due to him, and an allegation that the seaman was guilty of smuggling, by reason of which the vessel was subject to penalties and the seaman forfeited his wages, is sufficient, in the absence of evidence, to entitle the seaman to a decree for the amount of his wages.

THIS was a libel by John Armstrong for seaman's wages. The libel alleged that Armstrong shipped as mate on the vessel, and signed articles for a specified voyage at \$50 a month, and served on board from January 7th, 1872, to June 3d, 1872, when he was discharged, and there was due him from the vessel \$195, payment of which had been demanded and refused.

The answer admitted these allegations, except that it denied that anything was due to the libellant. It further alleged that Armstrong, while he was mate, smuggled segars on shore from the vessel, whereby she became subject to penalties, by which conduct he forfeited his wages.

The case was submitted on the pleadings.

For libellant, *Wilcox & Hobbs*.

For claimant, *Beebe, Donohue & Cooke*.

BENEDICT, J. The admissions in the answer are sufficient to entitle the libellant to recover the amount of his claim for wages as stated in his libel, to wit, \$195, for which amount, with costs, let a decree be entered.

DECEMBER, 1872.

THE STEAMSHIP CORTES.

SEAMAN'S WAGES.—INJURY TO SEAMAN ON BOARD SHIP.—COSTS.

A seaman, who had shipped in New York for a voyage to New Orleans and back, after the vessel had started on her return voyage from New Orleans fell from the yard and broke his arm. The owners of the steamer sent him at once to a hospital, paying his wages till the date of his leaving the ship, and afterwards brought him to New York. The seaman having filed a libel to recover wages for the rest of the voyage, and damages for the injury, the owners of the vessel paid the amount of the wages into Court, which the libellant drew out.

Held, that the libellant was entitled to the wages for the rest of the voyage, and as there was no proof or allegation of a tender of the amount, he was entitled to a decree for his costs.

THIS was a libel by William Price, who alleged that he shipped on the Cortes in New York for a voyage to New Orleans and back; that, after the vessel had started on her return voyage, he fell from the yard and broke his arm, and was sent to a hospital in New Orleans, and, after a few days, was brought to New York in another steamer and sent to the hospital in New York; and he claimed to recover \$18, a balance of wages due, and \$400 damages for the broken arm.

The owners of the steamer answered that they had paid the man up to the time when he left the ship, and were willing to pay him up to the time of the arrival of the Cortes in New York. His claim for damages they denied. And they paid into Court the amount of the wages which they offered to pay.

For libellant, *A. Nash*.

For claimant, *Man & Parsons*.

The Mayor, &c. of New York City *v.* Highland.

BENEDICT, J. The libellant having incurred no expenses in his cure is entitled to recover no more than the wages which the claimants have heretofore paid into Court.

In the absence of any proof or allegation of a tender of this or any sum, the libellant is also entitled to his taxable costs. The sum paid into the registry having been heretofore withdrawn by the libellant, he is now entitled to a decree for his costs only.

Southern District of New York.

JANUARY, 1873.

**THE MAYOR, &c. OF NEW YORK CITY *v.*
WILLIAM HIGHLAND.**

OVERLOADING PIER.—EXCEPTIONS TO LIBEL.

A libel to recover damages for injury to a pier by overloading it, which states that the pier is within navigable waters from the ocean and within the ebb and flow of the tide, and does not show that the pier is part of the land, is not liable to exception, as failing to state a case within the jurisdiction of the admiralty.

THE libel in this case alleged that the libellants were owners of Pier 46, East river, in the city of New York; that the pier was within navigable waters from the ocean, and within the flow of tide water; and that the respondent was the owner of the bark Maggie L. Carvill, which, while lying alongside such pier, negligently discharged cargo on the pier and damaged it to the amount of \$10,000. The respondent excepted to the libel, because the cause of action was not of admiralty cognizance.

The Brig Annie Lindsey.

For libellant, *A. J. Vanderpoel.*

For respondent, *C. Donohue.*

BLATCHFORD, J. I must overrule the exceptions to the libel in this case, on the ground that it does not appear, by the libel, that the pier named was part of the land, and was not a floating pier, while it is alleged, by the libel, that the pier was "within navigable waters from the ocean, and within the flow of tide water."

JANUARY, 1873.

THE BRIG ANNIE LINDSEY.

COLLISION IN THE SOUND.—SAILING VESSELS MEETING.—CLOSE-HAULED AND FREE.

A brig and a schooner came in collision in Long Island Sound, at night. The schooner was sailing to New York, and the brig was sailing from New York. The schooner saw the brig nearly ahead, and ported her helm. The brig saw the schooner nearly ahead, and first starboarded and then ported. There was a conflict of evidence as to the wind, the witnesses for the schooner claiming that it was nearly south, and those for the brig claiming that it was southeast. Each vessel claimed to have been close-hauled. The schooner had the wind on her port side. The brig had it on her starboard side. The brig struck the schooner on her port quarter. The brig alleged that she starboarded in obedience to a call from the schooner to "keep off:"

Held, That, on the evidence, the brig was close-hauled;

That, on the evidence of the brig, that she was heading east northeast, and saw the green light of the schooner from half a point to a point on her port bow, the vessels were meeting nearly end on, and, under the 11th Article, it was the duty of the schooner to port, which she did;

That, if the courses were crossing, there was risk of collision, as the brig was drawing a point on to the course of the schooner, and, under Article 12th, the schooner, having the wind on her port side, was bound to keep out of the way of the brig, which she endeavored to do by porting;

The Brig Annie Lindsey.

That, if they were meeting, it was the duty of the brig to port, instead of first starboarding, as she did; and that the excuse which she set up for the starboarding was not established;

That, if the courses were crossing, it was the duty of the brig to keep her course;

That, in either view, the brig was in fault, and liable for the damages;

That the schooner was not in fault.

BLATCHFORD, J. The libellants, as owners of the schooner Sallie Smith, and carriers of a cargo on board of her, bring this suit against the brig Annie Lindsey, to recover for the total loss of the schooner and her freight money and cargo, through a collision, which took place at about half past eight o'clock in the evening of the 7th of May, 1869, between those two vessels, in Long Island Sound, off Eaton's Neck light, whereby the schooner and her cargo were sunk. The schooner was bound to New York from the Connecticut river. The brig was bound from New York to New Brunswick.

The libel alleges that the wind was south half west; that the schooner had her regulation lights set and burning brightly; that she was heading a little south of west, or about west; that the sails of a vessel were made ahead, or nearly so, but no light was discernible; that she was apparently bound in an opposite direction, and, after she was discovered, and when it was apparent there would be a collision unless something was done, the wheel of the schooner was ported, and she opened the other vessel until the red light of such other vessel was seen off the port bow of the schooner; that the wheel of the schooner was kept to port, and the approaching vessel, which turned out to be the brig Annie Lindsey, was hailed from the schooner to luff, but, instead of porting, she was kept away, and her stem struck the port quarter of the schooner, and crushed in her side, so that she sank, with her cargo, in a few minutes; that the wind at the time was free for vessels upon their proper courses bound to the east, but those going west were close-hauled; that the collision was caused solely by the negligence of

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those navigating the brig, in not keeping a lookout, in not having the proper lights set and burning, in not porting and keeping to the right, when meeting a vessel ahead and bound in an opposite direction, and in starboarding instead of porting; and that the lights of the schooner were seen at a sufficient distance, by those on board of the brig, for them to have avoided the schooner.

The answer alleges that the wind was about southeast; that the schooner, when first seen by the brig, was steering a west by south course; that, just before the collision, the schooner suddenly changed her course to northwest, which brought her across the bow of the brig; that the wind was free for vessels bound to the west; that the brig was sailing close-hauled; that the collision was caused by the fault of those navigating the schooner; that the green light of the schooner was first seen on the lee bow of the brig; that the schooner, as she approached, was going to the windward of the brig, and hailed the brig to keep off, and the wheel of the brig was turned to keep off, and then the schooner suddenly changed her course to the northwest, and called out to the brig to luff; that the wheel of the brig was immediately put hard down, and she luffed, but too late, for the schooner kept off across the bow of the brig, and winged her foresail out, and the brig struck the schooner; and that the wind was on the port side of the schooner and on the starboard side of the brig.

The material points of difference raised by the pleadings are (1.) As to the wind. The libel alleges it was south half west; the answer, about southeast. (2.) As to whether the schooner, after getting to windward of the brig, kept away and crossed the bows of the brig.

The testimony is all in the form of written depositions. The witnesses for the libellants are Chase (the master of the schooner), Logan (the mate), and Reed (a hand). There were but two persons on deck on the schooner, Logan, at the wheel, and Reed, forward on the lookout. The master was below.

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The witnesses for the claimant are Parritt (the master of the brig), Nicholson (the second mate), and Davis (a hand). Nicholson was at the wheel, Davis was forward on the lookout, and the master also was on deck.

The deposition of Parritt was taken on the 30th of October, 1869. Then Reed and Chase, for the libellants, were examined in June, 1871, and Logan in October, 1871. Then Davis and Nicholson, for the claimant, were examined in October, 1871, and Parritt was, at the same time, examined again.

Reed was forward of the windlass, on the schooner. He says, that the wind was south by west; that the schooner was close-hauled; that he saw a vessel about dead ahead, but saw no light, and reported the vessel to Logan, and told him to swing her off, which was done, until the red light of the brig became visible to him, which was the first light he saw on her; and that he hailed the brig and told her to luff.

Logan, at the wheel of the schooner, says, that the wind was south; that the schooner was heading west by south; that Reed reported a vessel ahead and told him to keep off; that he ported; that, after that, he looked ahead and saw the red light of the brig; that he saw no other light, at any time, on the brig; and that Reed called to the brig to luff, and he also called to the brig to luff, after Reed had done so.

Chase, master of the schooner, says that the wind was south half west, and that the schooner was heading west half south.

It is to be noted, that neither Logan nor Chase says that the schooner was close-hauled in fact, or how her sheets were hauled. They leave it to inference, from the fact that, according to them, she was sailing only seven points off of the wind.

Parritt, on the deck of the brig, and her master, says, that he was bound east, but could not head his course, and was heading east northeast, and going about seven

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knots an hour ; that he saw a green light right ahead ; that, at the same time, his lookout reported a light right ahead ; that he heard a man sing out from the schooner to hard up his wheel ; that the brig was kept off one point, which opened the schooner's light broad on the weather bow of the brig ; that the schooner kept off across the bow of the brig, and sung out for him to luff ; that he luffed, by putting the wheel hard down, which caused the vessels to strike ; that the schooner, when she kept off, winged her foresail out ; that the brig was sailing close-hauled, and had her starboard tacks aboard ; that the wind was southeast, and the brig was sailing as near to the wind as a square-rigged vessel could sail ; that the schooner changed her course suddenly, from west by south to northwest, which brought her across the bows of the brig, and, when she saw there would be a collision, sang out to the brig to luff ; and that, if the schooner had kept her course, there would have been no collision.

Davis was standing forward, on top of the forecastle, on the brig, as a lookout. He says, that he saw a green light a little on his lee bow, a half a mile off, and approaching, and sung out, "light ahead ;" that he heard a cry from the schooner to keep off, and, directly afterwards, another cry to luff ; that, when he heard the cry to keep off, the schooner was going to the windward of the brig, and she suddenly turned and kept off across the bow of the brig ; that the brig was close-hauled, on her starboard tack ; that, when he first saw the green light, it bore from half a point to a point on his lee bow, and was nearly ahead ; that it afterwards got to be half a point on his starboard bow ; that the schooner then kept hard off, and crossed his bow, and showed her red light ; and that the vessels were very close together, when the cry came to luff.

Nicholson, at the wheel of the brig, says, that he heard Davis report a light ahead, and looked, and saw a

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green light about a point on his lee bow, and from a third to a half of a mile off; that the wind was east southeast to southeast, and the brig was close-hauled on the wind, and heading about east northeast; that he heard a man from the schooner, as she came up, sing out, "hard up your wheel;" that Captain Parritt, at the same time, gave him orders to keep her off; that he started to do so, and turned the wheel, and just then heard a cry from the schooner to luff; that Captain Parritt, at the same time, gave him orders to luff, and assisted him at the wheel; and that he was steering full and bye, and not by the compass.

According to the story of the schooner, as her witnesses tell it, she was heading west by south, or west half south, and saw a vessel ahead, but saw no light on her, and, without knowing that the two vessels were meeting end on, or nearly end on, ported. If the vessels were meeting end on, or nearly end on, so as to involve risk of collision, it was the duty of the schooner to port. The brig, according to her own testimony, was heading east northeast, and saw the green light of the schooner so nearly right ahead that it was not more than from half a point to a point on the port bow of the brig, nearly ahead. I conclude, therefore, on this view, that, under the 11th Article, the case was not one where the two vessels would, if both had kept on their respective courses, have necessarily passed clear of each other, but was one in which the vessels were meeting end on, or nearly end on, so as to involve risk of collision. It was, therefore, the duty of the schooner to port. According to her testimony, she did port, and did nothing else, and ported the moment the brig was seen, and swung off until the red light of the brig came into view. That the schooner did port, is testified to by the witnesses from the brig, it being contended by the brig, however, that this was not done until the green light of the schooner was seen half a point on the starboard bow of the brig.

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Regarding the courses of the two vessels as crossing, they involved risk of collision, as the brig was drawing a point on to the course of the schooner. On the evidence, I conclude, that, without doubt, the brig was close-hauled and did not have the wind free, and that the schooner was not close-hauled and did have the wind free. Hence, under article 12, the schooner, having the wind on her port side, was bound to keep out of the way of the brig. She endeavored to do so by porting, and ported, as before stated, until she opened the red light of the brig.

As meeting the schooner end on, or nearly end on, so as to involve risk of collision, it was the duty of the brig, under Article 11, as much as of the schooner, to port. It is very clear, that, at first, the brig did not port. On the contrary, she starboarded. Her master says that, by the starboarding, she kept off one point, until she opened the green light of the schooner broad on the weather bow of the brig. The starboarding is sought to be excused by the allegation, that it was done because the schooner hailed the brig to put her wheel hard up or to keep off. This is not confirmed by any witness from the schooner. It would have been a most extraordinary order for the schooner to give to the brig, when the schooner herself was porting. The proper order to be given, if the schooner was porting, was for her to order the brig to luff. The witnesses from the schooner say that they hailed the brig to luff. All the appearance of the green light of the schooner on the starboard bow of the brig that there was, was produced by the starboarding of the brig, the schooner having only ported and not starboarded. On this view, therefore, there was fault in the brig, in starboarding, which contributed to the collision.

As crossing, with her course, the course of the schooner, so as to involve risk of collision, it was the duty of the brig, under Articles 12 and 18 (the two ves-

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sels having the wind on different sides, and the brig having the wind on her starboard side and not having it free, and the schooner having the wind on her port side, and not being close-hauled), to keep her course, and to permit the schooner to keep out of the way, and not to attempt to keep out of the way herself. It is manifest, that the brig, by attempting to keep out of the way, and by starboarding to do so, thwarted the efforts of the schooner, by porting, to keep out of the way of the brig. The excuse, of the hail from the schooner, to keep off, has been already referred to.

Again, the brig being close-hauled, and having the wind on her starboard side, it was her duty to keep her course, and not to starboard, whether the schooner was close-hauled or not.

In any view of the case, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them by the collision.

Beebe, Donohue & Cooke, for the libellants.

G. M. Speir, for the claimant.

JANUARY, 1873.

IN THE MATTER OF JOHN M. BERRIAN AND
CORNELIUS A. BERRIAN, BANKRUPTS.

DIVIDEND.—SEPARATE ESTATE.—JOINT JUDGMENT.—INTEREST.

A debt, founded on a judgment against the two members of a firm jointly, in a suit on a partnership note, does not entitle the creditor to dividends out of the separate estate of each member of the firm, on an equal footing with the separate creditors of each member.

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Where the separate estate of one of the partners was more than sufficient to pay the separate debts of such partner, with interest added up to the day of the adjudication, but there was not sufficient to pay the creditors of the firm :

Held, That the separate creditors were not entitled, as against the joint creditors, to be paid interest on their debts for the period subsequent to the adjudication.

A FIRM, composed of John M. Berrian and Cornelius A. Berrian, having been adjudged bankrupts, the firm of James G. King's Sons, as creditors, filed a proof of debt, showing a claim on a judgment for \$2,532 44, entered against both debtors jointly, on a partnership note. There was a separate estate of John M. Berrian, amounting to \$1,065 22, and separate debts were proved against him, amounting to \$526 72. There was also a separate estate of Cornelius M. Berrian, amounting to \$1,065 22, and separate debts were proved against him, amounting to \$1,605 21. The amount of the claims proved against the joint estate was \$49,712 10. James G. King's Sons claimed to be paid a dividend out of the separate estates of the members of the firm. The register certified the question to the Court, with his opinion that they were not entitled to such dividend.

BLATCHFORD, J. James G. King's Sons are not entitled to dividends out of the separate estate of each bankrupt, on an equal footing with the separate creditors of each bankrupt.

The separate creditors having claimed to be paid interest subsequent to the adjudication, the case was again brought before the Court on the following agreed statement of facts, with the certificate of the register that, in his opinion, the separate creditors were not entitled to such interest.

" Claims against the separate estate of the bankrupt John M. Berrian, including computation of interest up to the date of the adjudication only, have been proved.

" At the meeting of creditors held November 12th, 1872, it appears, by the assignee's account, that he has

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collected sufficient money to pay all the debts proved against the separate estate of John M. Berrian, after payment of costs, fees and expenses, and leave a surplus.

"Joint creditors of the bankrupts have proved claims against the joint estate of the bankrupts to the amount of \$49,712 10, and upwards, which the surplus arising from John M. Berrian's separate estate is not sufficient to pay.

"The separate creditors of John M. Berrian claim that, before the surplus of his separate estate is applied to the payment of joint debts, the interest on the separate debts of John M. Berrian shall be computed from the day of adjudication, and the surplus applied to the payment of such interest.

"The assignee claims that the surplus is to be applied to the payment of joint debts, and not to the payment of interest which has accrued since the adjudication, on the separate debts of John M. Berrian."

For the creditors, *J. L. Bishop.*

For the assignee, *F. N. Bangs.*

BLATCHFORD, J. The 36th section of the bankruptcy Act, in saying that the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors, and that, if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors, follows the language of the Massachusetts insolvent law, under which (*Gen. Stats. of Mass. of 1838*, chap. 163, § 21), it was held, in *Thomas v. Minot* (10 *Gray*, 263), that, where a partnership and its members are in insolvency under one commission, or one adjudication in the same proceeding, and the separate estate of one partner is more than enough to pay his separate debts, at the amounts

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proved, as they stood at the time of liquidation recognized by the statute (which, in that case, was the day of the first publication of notice), without computing interest thereon after that time, the surplus of such separate estate, over such debts, is to be added to the partnership estate, and applied to the payment of joint debts, before paying such interest on the separate debts. The rule laid down in that case was established in 1857, and ought to be followed, under the like provision in the bankruptcy Act, as being substantially a construction of the provision, which accompanied its enactment.

JANUARY, 1873.

IN THE MATTER OF NORMAN W. KINGSLEY,
A BANKRUPT.

EXAMINATION OF BANKRUPT.

Where an order for the examination of a bankrupt is issued at the instance of a creditor who has duly proved his debt, the bankrupt cannot refuse to be sworn under the order, by reason of his claiming that he has an offset which extinguishes the creditor's debt, and desires to file a petition for the re-examination of the claim.

In this matter the register certified to the Court, that he had made an order for the examination of the bankrupt, under the 26th section of the bankruptcy Act, on the application of one Showers, a creditor who had duly proved his debt; that, on the return of the order, the bankrupt declined to be sworn, claiming that Showers was not a creditor, and was not returned as such in the schedule attached to the petition, and that any indebtedness which had ever existed from the bankrupt to Showers had been offset and extinguished by a counter

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indebtedness from Showers before the filing of the petition; and that he desired to file a petition for the re-examination of Showers' claim.

BLATCHFORD, J. So long as the debt stands proved and unimpeached, the claim stated to have been made by the bankrupt before the register furnishes no ground for a refusal of the bankrupt to be sworn and examined.

JANUARY, 1873.

THE FERRY-BOAT MANHASSET AND THE STEAMTUG HIRAM PERRY.

COLLISION IN EAST RIVER.—TUG-BOAT AND TOW.—STEAMERS CROSSING.—WILFUL TORT.—JOINT NEGLIGENCE.

A tug, having several boats in tow, coming down the East river, on an ebb tide, rounded to to pick up another boat on the New York side, just above the Fulton ferry slip. A Fulton ferry-boat, coming out of that slip, came in collision with the stern boat on the port side. The ferry-boat claimed that, when she came out of the slip, the tug was going down the river, and that, after the ferry-boat got headed up the river against the tide, the tug turned around across her course. Her pilot stated that, as soon as he saw her sheer, he rang a bell to slow the engine, and then to stop and back; and the engineer testified that he made four or five turns of the engine ahead, under the bell to slow, before he stopped and backed. The speed of the ferry-boat was nearly done at the collision, and she struck the boat about twenty-five feet from her stern. The owner of the boat filed a libel against both the tug and the ferry-boat, but the tug was not seized under the process. On the trial, a motion was made, on behalf of the ferry-boat, that the libellant be compelled to bring in the tug, or the libel be dismissed. The motion was denied, but the libel was directed to be amended by striking out the prayer for process against the tug. On the trial, one of the libellant's witnesses testified, that it looked to him as if the ferry-boat hit the boat intentionally. The owners of the ferry-boat claimed that she was not liable for the wilful tort of her pilot:

Held, That, on the story of the ferry-boat, when the tug had turned so as to be

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heading across the river, the courses were crossing, and the ferry-boat, having the tug on her starboard hand, was bound to avoid her and her tow, and when the tug had turned so as to head up the river, the ferry-boat was the following boat, and was still bound to avoid them;

That the ferry-boat was in fault in not stopping and backing at once, as soon as her pilot saw the tug turn, instead of keeping on under a slow bell;

That the act of the pilot of the ferry-boat was not wilful, in such sense as to relieve the ferry-boat from liability for the result of it;

That, although the libel was filed against both tug and ferry-boat, the libellant could recover against the ferry-boat alone, because there was independent fault on her part, and any fault in the tug in sheering was not a fault which contributed to the collision.

BLATCHFORD, J. The libellant, as owner of an empty coal barge or chunker, which was in tow of the steamtug Hiram Perry, on the 13th of January, 1869, seeks to recover, in this suit, the damages sustained by him, by means of a collision which took place, about noon on that day, between the ferry-boat Manhasset, then on a trip from her slip at the foot of Catherine street, in New York, to her slip at the foot of Main street, in Brooklyn. The tug had six boats in tow, namely, two on each side of her, alongside, and two astern, the libellant's boat being one of the two astern, and being tailed on to the stern of the boat which was next to the tug on the port side of the latter. This chunker was a boat in two parts, divided crosswise. The stem of the ferry-boat struck the port side of the after half of the chunker, at about the middle of its length, and it soon afterwards sank. The tug, with her tows, was bound from the Wallabout, in Brooklyn, to South Amboy, and was about to pick up another empty boat, on the New York shore, at a point above the New York slip of the ferry-boat. The tide was strong ebb.

The story of the libel is, that the tug, when nearing the point where she desired to pick up the additional boat, rounded towards the New York shore, with the view of heading up to the tide; that, while she was heading in towards the New York shore, and gradually

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turning towards the east, the boats following in her wake, the ferry-boat came out of her slip, and, as she came out, gradually turned, so as to head to the east, and, keeping on, struck the chunker; that the approach of the ferry-boat was not noticed by those on the tug, until just as she was striking the chunker; that the collision was caused by the joint negligence of the two steam vessels, the ferry-boat being in fault in not going under the stern of the chunker, and the tug in not keeping a lookout; and that the chunker was entirely helpless and without fault. The libel prays for process against both the ferry-boat and the tug, and that they may both be condemned. Process was issued against both vessels, but was not served on the tug, and she has not appeared or answered. The ferry-boat was served with process, and appeared and answered. At the trial, a motion was made on the part of the ferry-boat, that the libellant be compelled to bring in the tug, or the libel be dismissed. The motion was denied, except so far as to direct the libel to be amended by striking out the prayer for process against the tug.

The answer of the ferry-boat denies the allegation of the libel, that the tug is within this District. It sets up, that, on the coming out of the ferry-boat from her slip into the river, her pilot saw the tug and her tows in the middle of the river, heading down; that there was nothing to indicate any intended change in their course; that their position and the rate of the tide were such, that the ferry-boat could not have crossed the river in front of them without great danger of collision with them, and could not have made her proper and necessary course, at that state of the tide, if she had crossed in front of them; that, therefore, and thereupon, she was headed up the river, against the tide, in order that she might safely pass between them and the New York shore, as prudence and good navigation required her to do, and as was the obvious and proper and usual course, under

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such circumstances, and as there was plenty of room for her to do ; that the course on which the ferry-boat was thus placed was such, that, but for the misconduct of the tug, or the tug and chunker, or the tow, or those managing and having charge of the same, she would easily have gone clear of the tow and of the chunker, and between the same and the New York shore ; that, while the ferry-boat was thus proceeding on her course, and on a line widely clear of, and parallel to, the line on which the tow, including the tug, was moving, the tug and tow suddenly sheered in rankly towards the New York shore, across the course and track of the ferry-boat ; that, perceiving that such action of the tug and tow would render a collision probable, the ferry-boat at once stopped her engines, and reversed her wheels, and backed, and did everything in her power to avoid collision with the tug, or her tow, or any part thereof, but, as the tug sheered across the tide, and changed her heading against it, the chunker was swung down, by the strong ebb tide, upon and against the bow of the ferry-boat ; that, at the time of the collision, the ferry-boat had no headway whatever, and did not run into, or against, the chunker ; that the approach of the ferry-boat was not noticed by those on the tug until just at the time of the collision ; that the tug had no lookout at the time ; that, if the chunker had been properly managed at the time, the collision might have been avoided ; that it resulted, in part, from such mismanagement of the tug, and also from the omission of the chunker seasonably to shift her lines, and to be so steered as to aid the ferry-boat in avoiding the collision ; that the ferry-boat, during the whole of her trip, was navigated with skill, care and caution, and everything that could be done to avoid the collision, or to lessen its violence, when it became inevitable, was done by those in charge of the ferry-boat ; and that the collision was caused wholly by the carelessness, negligence, and want

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of skill and prudence, and bad management, and bad and improper navigation, of the tug, or of the chunker, or of both, and of the persons then in charge of the same, or some of them.

Three witnesses have been examined on behalf of each party—the libellant himself, on his own behalf; and, on his part, the master of the tug, and her pilot. The libellant was on his own boat, at the time of the collision. The master of the tug was in her pilot house, steering her. Her pilot was on one of the boats on her starboard side. The witnesses for the ferry-boat are three persons from her—her pilot, who was in her pilot house, steering; a deck hand, who was standing at the king post, on her port side, at her bow; and her engineer, who was in her engine room, below deck.

It is impossible to conceive of stories more diametrically opposite than those which these witnesses tell. The libellant, and Conlon, the pilot of the tug, assert that the tug had turned and got headed pretty well around towards up the river, and angling upwards towards the New York shore, before the ferry-boat left her slip. Both of them say that they saw the ferry-boat as she was coming out of her slip. Parisen, the master of the tug, says that he did not see the ferry-boat leave her slip; that she had not left her slip when he began to round; that he did not see her until he had got headed about two-thirds up the river; and that, when he first saw her, she was about thirty or forty feet off from the chunker.

Kershaw, the pilot of the ferry-boat, says, that, as he started to go out of his slip, he saw the tug heading down the river; that she was so heading when he went out of the slip; that he headed up the river, and would have passed one hundred feet or more to the New York side of her, but, after he got straightened up the river, the tug changed her course, and turned short across the bow of the ferry-boat, without making any signal before

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sheering ; that he rang to slow, stop and back, when the tug sheered ; that the tug went one hundred feet clear of the ferry-boat, across her bow, but the strong tide swept the chunker down against the ferry-boat ; and that the tug was heading very nearly straight up the river, the same way with the ferry-boat, at the time of the blow. Boyd, the deck hand on the ferry-boat, says, that, as the ferry-boat went out of the slip, he saw the tug heading down the river ; that the ferry-boat turned up, and, after she got straightened up, the tug, without making any signal, rounded to across the bow of the ferry-boat ; and that, at the collision, the tug was the length of two boats away, and headed up the river about the same way with the ferry-boat.

Although positively testified to by the witnesses for the ferry-boat, it requires great faith to believe it possible that in the short space of time which elapsed between the time the ferry-boat left her slip and the collision, the tug could have left a straight course down the river and rounded to and described a complete half circle, and come to head directly up the river, the same way with the ferry-boat. The story on the part of the libellant is much the more probable one, in view of all the circumstances surrounding the occurrence. But it is not necessary to solve this question, for, even assuming that the tug did not begin to turn till after the ferry-boat was coming out of her slip, the evidence on the part of the ferry-boat shows that she ought to have avoided the collision, and might have done so. From the time the tug, in turning, got so far around as to head so towards the New York shore, that her course was crossing that of the ferry-boat, the ferry-boat, having her on the starboard side, was bound to avoid her and her tow. So, from the time the tug, in turning, got so far around that the ferry-boat became the following boat, the ferry-boat was bound to avoid the tug and her tow. The pilot of the ferry-boat says, that he rang his

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bell to slow when the tug sheered, as soon as he saw her sheer; that he then immediately rang the bells to stop and back; and that the way of his boat was about done, when the collision took place. The engineer of the ferry-boat says, that, on starting from the slip, he received one bell, to go ahead; that, while running under that bell he received another bell; and that, on receiving this last bell, he shut his engine off. That was a bell to slow. To shut off, is to slow, not to stop. The bell to slow was the bell which the pilot says he rang as soon as he saw the tug sheer. The engineer says, that he made four or five turns ahead, while so running slowed down, and then received two bells to back; that he had made about four or five turns back before he felt the blow of the collision; and that, with such a strong ebb tide as there then was, four or five turns back would pretty much kill the headway of the boat. As it was, the ferry-boat almost avoided the collision. She did not strike a point further forward on the chunker than twenty-five feet forward from the extreme rear. I cannot resist the conclusion that, if the ferry-boat, instead of continuing to run ahead four or five turns, under the slow bell, had stopped and backed sooner than she did, the collision would have been avoided, and she would have passed under the stern of the chunker. The pilot of the ferry-boat says, that the way of his boat was about done when she struck the chunker. If this was so, and if the four or five turns back effected that result, more turns back, instead of the four or five turns ahead, under the slow bell, would, undoubtedly, with the strong ebb tide, as the tug was going ahead, have enabled the ferry-boat to clear the tow.

One of the witnesses for the libellant stated, in his testimony, that, in his judgment, the ferry-boat did not try to avoid the chunker; and that it looked to him as if the ferry-boat hit her intentionally. The claimants, assuming this as a fact proved, urge, that the ferry-boat

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is not liable for a collision caused by the wilful fault of her pilot. But, the wilful character of the act is not set up in the libel, nor is it averred in the answer, and it is very far from being established by the above-mentioned remark of the witness. There is nothing to show that the act was wilful, in the sense of being malicious, or that the ferry-boat ran against the chunker because of an intention to do so on the part of her pilot. The act was wilful in one sense, because the acts of the pilot were the voluntary emanations of his will, but there is nothing to show that his intention was to cause a collision.

It is also urged, for the claimants, that, as the libel alleges joint negligence in the tug and the ferry-boat, as the cause of the collision, the tug ought to have been brought in by process, she having been made a party by the libel. But this point is disposed of by the amendment referred to. The suit stands, and was tried, as one against the ferry-boat alone. The only question is, as to whether the ferry-boat was guilty of independent fault or negligence which caused the collision. The chunker was helpless, and did nothing to cause the collision. The fact that the tug may also have been in fault, in some particular, is of no consequence, as respects fault on the part of the ferry-boat, provided the fault of the ferry-boat is one distinct from, and independent of, any alleged fault on the part of the tug. The only fault set up, on the part of the ferry-boat, as a fault in the tug, is, that the tug suddenly sheered across the course of the ferry-boat. But, notwithstanding the tug may have sheered, to turn, after the ferry-boat left her slip, there was the separate and independent fault, on the part of the ferry-boat, which has been pointed out. The allegation of her answer, that she at once stopped her engines and reversed her wheels and backed, on perceiving the sheer of the tug and tow, and that it would render a collision probable, is disproved by the

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testimony of her engineer. For the fault of the ferry-boat, the libellant is entitled to recover his full damages against the ferry-boat alone, because, in the view I take of the case, any fault there may have been on the part of the tug, in sheering, was not a fault which contributed to the collision which the fault of the ferry-boat caused. The ferry-boat ought to have, and could have, avoided the chunker, in the actual predicament, whether the chunker was brought to her position by a sheer before, or a sheer after, the ferry-boat left her slip.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

Beebe, Donohue & Cooke, for the libellant.

B. D. Silliman, for the claimants.

JANUARY, 1873.

THE SHIP CIVILTA AND THE STEAMTUG
RESTLESS.

COLLISION IN THE SOUND.—STEAMER AND SCHOONER.—TOW-BOAT
AND TOW.

A schooner was sunk, in Long Island Sound, by a collision with a ship which was at the time being towed at the end of a hawser, by a tug. The night was bright moonlight. The wind was light, from a little west of south, and the schooner was heading about northeast, and going at the rate of from two to three knots an hour. The ship and tug were heading about southwest. The schooner saw the ship and tug a little on her port bow at first, but the tug crossed to her starboard bow when a short distance ahead, and the schooner, keeping on her course, came against the hawser by which the tug was towing the ship, and was then struck on her port side by the ship's stem. The tug was towing the ship

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at the rate of about seven miles an hour. The ship and tug claimed that the course of the schooner was parallel to theirs, and that, just as she passed the stern of the tug, she ported her helm and so came across the hawser and between the tug and ship, and thus caused the collision. The ship was under the charge of a pilot, who was on board of the ship, but he gave no order to the tug. The hawser by which the ship was towed was about two hundred and fifty feet long:

Held, That the ship must be regarded as a ship under steam at the place of collision, because she was moving by steam alone, and her steam power, though two hundred and fifty feet away, was so by her option;

That it was, therefore, the duty of the schooner to keep her course, and the duty of the ship to keep out of her way;

That, on the evidence, the courses of the vessels were nearly end on, and yet drawing across each other, the tug and ship drawing across the course of the schooner from port to starboard;

That the burden was on the ship to establish that the schooner changed her course;

That, on the evidence, the schooner did not change her course;

That, in the absence of any special instructions from the pilot who was in charge of the ship, to the tug, as to what was to be done on the approach of the schooner, it was the duty of the master of the tug to take care so to navigate the tug and the ship as to avoid a collision between either and the schooner;

That both ship and tug were, therefore, liable.

BLATCHFORD, J. This is a libel to recover for the damages caused by the sinking of the schooner *Magellan*, through a collision which took place between that vessel and the ship *Civilta*, off Hart's Island, at a little after half past two o'clock in the morning, on the 22d of December, 1872. The schooner was bound for Boston, from New York. The ship was in tow of the steamtug *Restless*, being towed behind her, by a hawser, and was bound to New York, from New Haven. The night was pleasant and lit by the moon. The wind was light, and a little to the west of south. The schooner was sailing free, with her booms off to port, and was making from two to three knots an hour. The ship and tug were making over seven knots an hour. The schooner went safely by the tug, and came in contact with the hawser, and broke it, and then the ship struck the port side of the schooner at about the port fore rigging of the schooner, the schooner's port side being crushed in, and

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the ship's bowsprit being broken, and the two vessels becoming so entangled that the schooner, when she sank, sank under the ship's bows.

The libel avers, that the schooner was heading about northeast; that the lights of the tug and of the ship were discovered about half a mile off, bearing a little on the port bow of the schooner; that the schooner was kept steadily on her course, without change; that the tug headed for the schooner, until she was very near to the schooner, and then suddenly sheered to port, across the bows of the schooner, and just cleared her, but brought the ship down upon the schooner; that the schooner made no change of her course, and did nothing to cause the collision, and the same could have been easily avoided by the ship and tug, if they had either changed their course earlier, or had changed it to starboard, instead of changing it to port, or had stopped in time; that the schooner could have been seen in abundance of time to enable the tug and ship to avoid her, and she was so seen, but, if she was not, it was in consequence of the want of a lookout, or of negligence on his part; and that the ship was in charge of a pilot, and the collision was caused by negligence on the part of both the ship and the tug.

The answer of the ship sets forth, that the ship had a Hell Gate pilot on board, and was being towed with general instructions from the tug to follow in her wake; that the course of the tug was southwest, that being the regular and proper course, in the neighborhood of Hart's Island, for vessels bound westerly; that the schooner was made ahead and off the starboard bow of the tug, and steering about northeast, and about on a parallel course with the tug and the ship, and on a course which, if continued, would have carried the schooner at a safe distance on the starboard side of the tug and ship; that the schooner passed the tug, the tug having kept steadily on her course; that, when the schooner had thus passed,

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and when, by keeping steadily on her course, she would, with equal safety, have passed the ship, she kept away to the right, between the tug and the ship, and, although she was repeatedly hailed, from the tug and the ship, as soon as such change was made, to starboard, kept on, and ran upon the hawser by which the ship was being towed, and, by striking it, and by her onward motion, came in contact with the stem of the ship; that, the instant the change of the course of the schooner was seen, the wheel of the tug was starboarded, and she kept off to the left, and the wheel of the ship was promptly starboarded, to follow in the wake of the tug, and, if possible, avoid the schooner, but, owing to the change of the course of the schooner, the collision could not be avoided either by the tug or the ship; that, as the schooner approached the ship, and although careful attention was given, no one could be seen on the deck of the schooner until after the collision, when they were seen hurrying up from below, only partially dressed; that there was no lookout on the schooner, and, if there was any man at the wheel, he was asleep; that the collision was caused by no fault of those navigating on board of the ship, as she was helpless, and steadily followed, as directed, the wake of the tug; that the collision was not by the fault of the tug; and that it was caused by those on board of the schooner, and in charge of her navigation, in, among other things, not having a lookout, and not having a man at the wheel attending properly to his duties, and not seeing the ship in tow of the tug, and changing the course of the schooner, when she had a free wind, and not changing back, when hailed. The answer of the steamtug contains like averments.

The course through Long Island Sound, from the eastward, to a point between Execution Rocks light and Sands' Point light is west southwest, by the coast survey chart. From that point to a point some distance to the

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westward of where this collision occurred, the course, to the westward, is, by such chart, southwest one-quarter south. The schooner insists that she was heading, by compass, northeast, when she sighted the green and red lights of the tug, and the white bow light of the tug, and two white lights aloft on the tug, and a white light on the foreyard of the ship, and that those lights were sighted bearing from a point to a point and a half on the port bow of the schooner, or, as the libel says, "bearing a little on the port bow of the schooner." The tug and the ship insist that they were heading, by compass, southwest, when they saw the sails and hull of the schooner, but none of her lights, bearing from a point to a point and a half on the starboard bow of the tug and of the ship, or, as the answers say, "ahead and off the starboard bow." The libellants claim that the tug and the ship, from being thus off the port bow of the schooner, drew across her course, she keeping her course, until the tug crossed such course and shut in her red light, so that the tug left the ship in such a position that the schooner, in her onward course, got in between the tug and the ship. The defence claims, that the schooner was on a parallel course with the tug and the ship, and at a sufficient distance off to pass safely to their starboard, and that the schooner, after getting by the tug, ported suddenly, and sheered sharply in between the tug and the ship.

The witnesses on the part of the schooner are Tracy (her mate), who was at her wheel, George Parker (a hand), who was forward on the lookout, Sargent (her master), and Clark Parker (a hand). As the two vessels approached each other, Tracy and George Parker were the only persons on the deck of the schooner. Sargent and Clark Parker were in the cabin. Tracy had taken the wheel at two o'clock, some thirty to forty minutes before the collision. He had been on the lookout, forward, from one to two o'clock, and, during that hour,

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George Parker was at the wheel. At two o'clock Tracy and George Parker changed places. Tracy says, that, when he took the wheel, the schooner was a little past the Stepping Stones; that her course, when he took the wheel, was north northeast; and that, as soon as he took the wheel, he changed her course to northeast. The point of change would be about the point where, on the chart, the marked course, going to the westward, changes from south southwest to southwest one quarter south, such marked course being north northeast, from off Throg's Neck, eastwardly, to a little to the eastward of the Stepping Stones, and then northeast one quarter north to a point between Execution Rocks light and Sands' Point light, and then east northeast nearly up to Stratford Point buoy.

Tracy says, that he saw the lights of the tug, namely, her green and red lights, and the white light at her stem, and her two lights aloft, and the light on the foreyard of the ship, all at the same time, bearing about a point, or a point and a half, on his lee, or port, bow; that he saw them before any report was made to him by the lookout, of any light; that the lookout's hail was, "a steamer on your lee bow;" that the tug and ship were then from a half to three-quarters of a mile off, and steering, as he thought, about southwest by south; that, when 50 or 100 yards off, the tug changed her course and went across his bows, to his starboard, and hid her red light; that, up to that time, there had been no change in the course of the schooner, and her helm was then about amidships; that, when the tug showed on his starboard bow, he stepped three or four feet, to the gangway, and called to all hands to come on deck, letting go of the wheel and coming back and taking it again; that there was no change of it while he was gone; that he was steering northeast at the time, by compass; that, when the tug had got her length clear of him on his weather bow, he heard a hail from her,

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"keep off;" that, at that time, the ship was under his lee, tending a little ahead; that the schooner struck the ship's hawser, and then the two vessels struck each other; that the schooner had up her mainsail, foresail, jib, flying jib and main gaff-topsail; that, up to the time the tug changed her course, he had seen no colored lights on the ship; that, when he first saw the lights, he thought it was a tug towing a vessel; that he heard no whistles from the tug, before the collision; and that, if the tug had kept on, without changing, she would have hit the schooner.

George Parker testifies, that he was forward of the foremast, looking out; that, when he first saw the lights, he saw the side lights, and bow light, and a light aloft, on the tug, and a light on the ship, from three-quarters of a mile to a mile off, and bearing from one to two points on his lee bow; that he reported to Tracy, "a steamer on the lee bow," and Tracy answered that he saw her; that, when the tug was from 50 to 100 yards off, and her lights were bearing a point or more on his lee, she hid her red light; that, after the tug went by the bow of the schooner, he heard a hail from the tug "keep off;" that he did not leave his place forward until the tug had got within 20 feet; that he saw no colored lights on the ship before the collision; and that he did not hear any whistles from the tug.

Sargent was in the cabin. He did not hear the report of the lookout, or the answer of Tracy, or the whistles from the tug. The first thing he heard was Tracy's call for all hands to come on deck, and then he went out. He says, that, when he got on deck, the ship was under his lee bow, and Sands' Point light was nearly ahead, on the starboard side, between the jib boom and the fore rigging of the schooner; that he and his crew got into a small boat; that he was astern of the schooner, in the boat, and about in a line with the keel of the schooner, when she sank, and then noticed that Sands' Point light

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bore from two and a half to three points on the starboard bow of the schooner, which would make the schooner head about north northeast when she sank, she not having separated from the ship.

The witnesses for the defence are, Franklin (pilot of the tug, and who was at her wheel in the pilot house), Parks and Milliken (hands on the tug, and who were in the pilot house), Banta (a Hell Gate pilot, who was on the ship, on deck), Valcich (master of the ship, who was on deck), Dik (a hand on the ship, who was on the lookout, forward), Rosa (a hand on the ship, who was steering her by a tiller), and Stanger (mate of the ship, who had been below, but came on deck before the collision, on hearing whistles blown by the tug).

Franklin says, that he first made the schooner probably 700 yards off, and bearing about a point or a point and a half on his starboard bow; that he saw her sails and the shape of her, but saw no lights on her; that he judged her to be heading about northeast; that she passed his bow, to his right, and about from 60 to 100 feet off; that he was steering southwest; that, as the schooner passed him, she changed her course, by putting down her helm, and went in between the tug and the ship, and struck the hawser; that, when he saw that change, he blew five whistles and hailed to the schooner to keep off, that he had a ship in tow, and put his wheel to starboard; that the tug changed her heading one point to the southward, before the collision; that the schooner was heading about southeast when the ship struck her; that, from Sands' Point the tug and ship were in charge of the Hell Gate pilot who was on the ship; and that he had received no orders from that pilot.

Parks and Milliken each give substantially the same testimony as Franklin, in regard to the above matters.

Banta says, that the ship had her colored lights up, and a white light forward; that he was aft near the

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tiller ; that, when he first saw the schooner, the ship was heading southwest, by compass ; that he saw the sails of the schooner bearing about a point and a half on his starboard bow, and about 600 yards off ; that he saw no lights on the schooner ; that he next heard five whistles from the tug, and saw the schooner luffing sharp, and heard a hail from the tug to keep off, and helped to put the tiller of the ship to starboard, and then ran forward, by which time the vessels had struck ; that, up to the time of the whistles, he noticed no change in the tug ; that, when the vessels struck, the schooner was heading about southeast ; that the ship changed only one point by starboarding ; that he was pilot of the ship from Sands' Point, and it was his place to hail the tug if her course was not suitable ; and that he gave no direction to the tug, and was not close enough to her to give any.

Valcich says, that the first he saw of the schooner was her sails, bearing nearly a point off his starboard bow, and a little on the starboard side of the tug, and from 600 to 700 yards off from the tug ; that he saw no lights on her ; that he was standing on the forecastle of the ship, and saw the schooner, when she had got nearly past the tug, alter her course more to the southward, by a quick sheer ; that, when the schooner changed, the tug blew five whistles, and hailed to the schooner, and he and his lookout hailed to her ; that the schooner changed from northeast to southeast ; that, when the schooner changed, the tug kept off one point, and the ship starboarded one point ; and that he starboarded as the schooner was going across his bow. The above is his version, on his direct examination. On his cross-examination, he says, that he was standing aft when he heard the tug's whistles ; that he then saw the ship starboard ; that he then went forward ; and that, before the ship starboarded, he saw that the tug had changed her course. On his direct examination again, he reiterates, that he was on the forecastle when he saw the

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schooner change, and adds, that the schooner changed her course after he heard the whistles of the tug ; that, when he heard those whistles, the schooner was heading about northeast ; that the tug went off to the southward before the schooner did ; that he was running forward when the tug changed ; and that he was on the fore-castle, on the starboard side, when the schooner changed.

Dik says, that he was on the lookout, on the fore-castle of the ship ; that he first saw the schooner ahead of the tug, on his starboard bow, and about 20 or 30 fathoms from the tug ; that he saw the schooner pass the tug ; that, after the tug blew her whistles, the schooner, when a little astern of the tug, changed her course ; that, after the schooner changed, the tug changed, to go more to the south ; and that he saw no lights on the schooner.

Rosa says, that he had the tiller of the ship, and was steering southwest, when he heard the whistles from the tug ; that, soon after that, he saw the schooner crossing his bow ; that then he put his helm to starboard, by the order of, and with the aid of, the pilot ; that the ship had changed about a point towards the the south when the crash came ; that he did not see the schooner before he heard the whistles ; and that he saw the tug change, when the schooner got across the bow of the ship.

Stanger says, that, while below, he heard the whistles of the tug ; that he came up, and looked at the compass ; that the ship was then heading southwest ; that he then ran forward and saw the schooner astern of the tug, crossing ; that he saw the schooner strike the hawser, and was on the fore-castle when the vessels struck ; that he saw no lights on the schooner ; and that, when he got on the fore-castle, the tug was keeping to the south.

On the facts proved in this case, the ship must be regarded as a ship under steam, at the place of collision. From Sands' Point, westward, the ship and tug were under the charge and direction, as to navigation, of the pilot on

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board of the ship, who was in the service of the ship. It is true, that the steam power of the ship was on board of the tug, more than 250 feet away ; but, the fact that it was at that distance off was owing to the voluntary action of the pilot, who might have had the tug alongside of the ship, and did put her alongside after the collision. The steam power of the ship, by which alone she was moving, was where the ship chose to have it. If the tug had been alongside of the ship, the two would, in law, have been regarded, *quoad* the schooner, as one vessel, and that a steam vessel, the motive power being in the tug, and the governing power in the ship. It can make no difference, so far as the rights of the schooner, as against the ship, are concerned, that the tug, at the option of the ship, was 250 feet away (The Cleadon, 14 Moore's P. C. C. 92, 97). If the schooner did nothing to produce the collision, it was the duty of the ship, as a ship under steam, to keep out of the way of the schooner, and the duty of the schooner to keep her course. The question is, whether the ship failed to discharge that duty, through any fault of the schooner, in not keeping her course, or otherwise. The burden is on the ship, to exculpate herself. In my judgment she has not done so.

The ship sets up, in her answer, that the schooner did not have a lookout. This is sought to be maintained by evidence that he was not seen from the other vessels. But, it is shown that he was at his post, and reported the tug, and left his post only when it was becoming dangerous for him to remain there.

The ship also sets up, in her answer, that the schooner did not have a man at the wheel, properly attending to his duties, and that, if there was any man at the wheel, he was asleep. This is shown, by the evidence, to be a reckless assertion, and void of foundation.

The ship also sets up, that the schooner did not see the ship in tow of the tug. This is disproved by the evidence.

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The ship also sets up, that the schooner changed her course at a time and place when otherwise she would have gone safely by the ship, and did not change back, when hailed. It is for the ship to establish this change of course, and to establish it, if made, as one not made in the moment of peril.

The positive evidence from the schooner is to the contrary of any such change. If it is to be taken as absolutely true, that the schooner and the ship were steering opposite and parallel courses, it cannot be true that the tug and ship were seen off the port bow of the schooner, and that, at the same time, the schooner was seen off the starboard bows of the tug and ship. The testimony from each vessel, as to where away she saw the other vessel, is more reliable evidence, when such testimony from both vessels is applied to the case, as to the manner in which the two vessels were approaching each other, than any testimony as to compass courses, particularly where, as here, the vessels were in a comparatively narrow strait, and had lights ahead, the schooner being headed to go between Execution Rocks light and Sands' Point light, and being about two miles away from them, and the tug and ship being headed about for Throg's Neck light, and being about three miles away from it. It is true, that the proper chart courses of the two vessels, in the reach where they met, would be, that of the schooner northeast one-quarter north, and that of the ship southwest one-quarter south, and thus directly opposite; but, allowing for a little divergence from such courses, and for a tendency on the part of the witnesses from both vessels to exaggerate, the schooner, the extent to which the ship was on the port bow of the schooner, and the ship, the extent to which the schooner was on the starboard bow of the ship, and the vessels are brought each nearly ahead to the other, and nearly end on, and yet drawing across the courses of each other, the tug and ship drawing across

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the course of the schooner from the port side of the schooner to the starboard side of the schooner, and the schooner drawing across the course of the tug and ship from their starboard side to their port side, and thus the schooner seeing the tug and ship a little on her port bow, and the tug and ship seeing the schooner a little on their starboard bow. Then again, the schooner saw both of the colored lights of the tug, up to a time when the tug was but a few feet off from the schooner, and then the green light of the tug remained in view, and her red light went out of view, showing that she must have been nearly ahead to the schooner, but drawing from port to starboard of the schooner. And, in this regard, it is very important to note, that the tug and ship saw no lights on the schooner, although the evidence is that they were set, and properly burning. All that the persons on the tug and ship saw, was the sails and hull of the schooner. If they had seen her colored lights, and observed and described their bearing and movements, we should have been able to see how the schooner was approaching the tug and ship, as we are able to see how the tug and ship were approaching the schooner, from the view had on the schooner of the colored lights of the tug. I conclude, from these considerations, and from the whole evidence, that the schooner did not change her course; that the tug and ship mistook the course of the schooner; that the schooner's course was really drawing on to the course of the tug and ship, in such wise that the two courses were practically end on, where they crossed; that the unchanged courses of the schooner and the ship crossed each other just in advance of the ship, and either between the tug and the ship, or at a point ahead of the tug, so that the tug, by starboarding, avoided striking the schooner; and that the tug and ship, not seeing any colored lights on the schooner, and thus not being able to know which way the schooner was coming, ought not to have kept on, with undiminished

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speed. The tug did not slow until the schooner got up to her, and did not stop until the schooner was just striking the hawser.

The change attributed to the schooner is a deliberate one, made by porting, to luff into the wind. It is not a change which could have taken place by the leaving of her wheel, because that would have caused her to go to port, by falling off with the wind. The schooner cannot be held in fault for not starboarding, either before being hailed from the tug or after that. She had a right to suppose the tug and ship would avoid her; and the discovery by her that the tug was crossing her bows, and that the ship was getting in her way, was made, and the hail from the tug came, at a time when a collision with the ship was inevitable, so far as there appears to have been any power in the schooner to avoid it by starboarding.

The suggestion that the schooner's lights were not burning, because they were not seen from the tug or ship, cannot control the distinct evidence from the schooner that they were burning. Moreover, it is not set up, in either of the answers, that any want of lights on the schooner misled the tug or the ship, or contributed to the collision. Nor is any allegation to that effect made, in either of the answers, respecting the non-exhibition of a flash light by the schooner. The ship had her colored lights burning, and yet neither of them was seen from on board of the schooner, before the collision, while all the other lights of the tug, and the white light of the ship, were seen; and the whistles of the tug were not heard on the schooner. It is, therefore, not a strange circumstance, that the schooner's colored lights were not seen.

Is the tug, also, liable for this collision? She was subject to the orders of the pilot in charge of the ship, as is clearly shown. But the tug received no orders from him. While it would have been the general duty of the

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tug to have followed all orders from the ship, and while the tug would not have been liable, if the collision had resulted from her following improper orders given from the ship, yet, under the actual facts of this case, I think the tug is liable equally with the ship. In the absence of any special instructions from the pilot in charge of the ship, as to what was to be done in view of the approach of the schooner, it was the duty of the master of the tug, knowing, as he did, that, from Sands' Point, the pilot on the ship was in charge, and knowing, also, that the ship was too far behind for orders to be given, and that it was the privilege and duty of the tug to be placed alongside of the ship, where orders could be readily received, to take care so to navigate the tug and the ship as to avoid a collision between either and the schooner (The Secret, 8 *Mitchell's Maritime Register*, 116). If the collision had happened to the eastward of Sands' Point, the tug would clearly have been liable, and the ship not liable. The fact that the ship is held liable for this collision, for the reasons before given, cannot exonerate the tug from responsibility for not practically giving the charge up to the ship, by taking the ship alongside from Sands' Point, and for leaving the state of things, as regarded the relations of the tug to the schooner, to continue the same as they were before the tug and ship reached Sands' Point.

There must be a decree for the libellants, against both vessels, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

R. D. Benedict, for the libellants.

Beebe, Donohue & Cooke, for the tug and the ship.

JANUARY, 1873.

**IN THE MATTER OF SEPTIMUS E. SWIFT, A
BANKRUPT.****DEBT CONTRACTED BEFORE JANUARY 1, 1839.—JUDGMENT.**

S. hired premises of H., in 1865, for 5 years. He surrendered the lease in May, 1868, and the landlord agreed with him to rent the premises, S. to pay any deficit in the rent. There was a deficit, and in May, 1871, H. obtained judgment against S. for such deficit. S. becoming a bankrupt, H. proved the judgment as a debt against the estate, and filed specifications in opposition to his discharge. S. had no assets, and did not obtain the consent of creditors, provided for in the 33d section of the bankruptcy Act, as amended on July 27th, 1868 (15 *U. S. Stat. at Large*, 228):

Held, that the debt was contracted prior to January 1st, 1869, within the meaning of the Act of July 14th, 1870 (16 *Id.* 276).

THE bankrupt having made application for his discharge, specifications in opposition thereto were filed by Gould Hoyt, executor, &c., a creditor who had proved his claim.

The facts in relation to the claim were these: On April 16th, 1865, Swift leased of Hoyt, executor, &c. certain premises in New York city, for five years from May 1, 1865. In May, 1868, he surrendered the lease, and the landlord accepted the surrender, and they agreed that the landlord should rent the premises for the best price he could obtain, for the remainder of the term, and that any deficit in the rent from the amount of rent reserved by the lease should be paid by the tenant. There was a deficit, and, on the 1st of April, 1871, the landlord obtained judgment against Swift for \$9,144 43 for such deficit, and this judgment he proved as a debt against the estate.

The register certified that the bankrupt had con-

In the Matter of Septimus E. Swift, a Bankrupt.

formed to all the requirements of the Act, unless the Court should hold that the debt in question was not contracted prior to January 1st, 1869.

The 33d section of the bankruptcy Act, as amended on July 27th, 1868, provides, that, in all proceedings in bankruptcy commenced after the 1st of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to 50 per cent. of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless he has the written assent of 50 per cent. of his creditors.

The Act of July 14th, 1870, § 1, provides that this provision shall not apply to debts from which the bankrupt seeks a discharge, contracted prior to January 1st, 1869.

The bankrupt had no assets. No assent in writing had been obtained by him. If this debt was contracted after December 31st, 1868, the consent of creditors was necessary.

For the bankrupt, *H. W. Fowler.*

For the creditor, *F. M. Scott.*

BLATCHFORD, J. In this case I am of opinion that the debt due to Goold Hoyt, executor, &c., represented by the judgment recovered April 1st, 1871, and from which debt the bankrupt seeks a discharge, was contracted prior to the 1st day of January, 1869, namely, when the agreement of May, 1868, was made. The case will, therefore, stand for hearing on the specifications filed by said creditor.

JANUARY, 1873.

**IN THE MATTER OF WILLIAM E. BROCKWAY,
A BANKRUPT.****EVIDENCE.—PROPER BOOKS OF ACCOUNT.—CHECK.**

On an examination of a bankrupt, under specifications in opposition to his discharge, the question was whether the bankrupt had kept proper books of account. The opposing creditor had offered in evidence the stump of a check in a check book. The bankrupt offered the check itself in evidence, which was objected to:

Held, That the check was admissible in evidence.

THE register in this case certified to the Court that, while testimony was being taken before him in support of specifications in opposition to the discharge of the bankrupt, which charged, among other things, that the bankrupt, being a merchant, had not kept proper books of account, counsel for the bankrupt offered in evidence, under such specifications, the stump of a check, in a check book; that the bankrupt then produced the check torn off from the stump, and offered it in evidence; and that counsel for the creditors objected to it as inadmissible. The register certified the question to the Court, with his opinion that the check was inadmissible.

BLATCHFORD, J. I think the check is admissible in evidence, as having once formed a part of the book, and as showing, with the stump, just how the book was kept.

Eastern District of New York.

JANUARY, 1878.

THE BRIG MONTE CHRISTO.

DISTRIBUTION OF INFORMER'S SHARE.—FRAUDULENT REGISTER.—ACT
OF JULY 18TH, 1866.

The Act of July 18th, 1866 (14 *U. S. Stat. at Large*, 184), is not an Act relating to the customs, within the meaning of the Act of March 2d, 1867 (14 *Id.* 546). The proceeds of a forfeiture under that Act are to be paid directly by the Court, one-half to the collector of the port, for the use of the United States, one-fourth to the informer, if any, and one-twelfth each to the collector, surveyor and naval officer.

BENEDICT, J. The question here presented by the District Attorney does not appear to have ever arisen in any reported case, nor can I ascertain that it has ever been brought under consideration in the practice of any of the departments of the Government.

It arises as follows: The brig Monte Christo has been condemned by this Court as forfeited to the United States, under the 24th section of the Act of July 18th, 1866 (14 *U. S. Stat. at Large*, p. 184), which provides: "And be it further enacted, that if any certificate of registry, enrolment, or license, or other record or document granted in lieu thereof to any vessel, shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel and furniture, shall be liable to forfeiture."

The proceeds of this forfeiture being in the registry of the Court, an informer made claim to be entitled to the informer's share, namely, one-fourth of the proceeds.

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No question was made as to the right of an informer to this portion, and it has been determined that the person claiming is, in fact, the informer. Whereupon I am required to determine whether the various parties entitled to share in these proceeds can lawfully receive payment of their share directly from the registry of the Court. Former decisions have left this question one of procedure merely (*U. S. v. George*, 6 *Blatch*. 37). By whomsoever the fund is distributed, the portions are to be the same, and the same parties are entitled thereto.

It is first to be considered whether the Act of March 2d, 1867 (14 *U. S. Stat. at Large*, p. 546), is applicable here; for if so, these proceeds, after deducting the charges and expenses, must be transferred to the treasury of the United States, to be thereafter distributed by the Secretary of the Treasury, in accordance with the order of distribution. The Act of March 2d, 1867, is confined, by its terms, to proceeds of forfeitures incurred under "the provisions of the laws relating to the customs," and it can have no application here, unless the 24th section of the Act of July 18th, 1866, be regarded as a provision of law relating to the customs. I do not see that the section should be so regarded. It relates solely to the use of fraudulent certificates of registry, enrolment, or license of ships and vessels, and would naturally be described as a provision of law relating to the registry or enrolment of ships and vessels, which is a well known class of statutes, in some instances certainly, treated as distinct from the laws relating to the customs. As, for instance, in the 11th section of the very Act under which this forfeiture has been incurred, where the phraseology is, "Acts relating to the customs, or the registry, enrolling or licensing of vessels." This distinction may well be supposed to have been in view in drafting the Act of 1867; and, in the absence of any reason for including the 24th section of the Act of July 18th, 1866, within the description of laws to which the Act of 1867 is ap-

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plicable by its terms, I conclude that the proceeds of a forfeiture incurred under section 24 of the Act of 1866 are not within the scope of that Act. We turn then, and naturally, to the provisions in section 31 of the Act of July 18th, 1866, under which Act this forfeiture was incurred, where it is provided that all forfeitures by virtue of that Act shall be disposed of and applied "as provided in section 91 of the Act of March 2d, 1799." This section 91 provides for the shares into which forfeitures are to be divided, and declares the parties entitled thereto, according to which one moiety is to be received by the collector, for the use of the United States, and the other half is to be divided between, and paid in equal portions to, the collector, naval officer and surveyor, unless there be an informer, in which case one-half the latter moiety must be given to such informer. That the collector is to receive the moiety going to the United States, is indicated by the words of the section, and a payment to the collector, to the naval officer, and to the surveyor of their respective shares is mentioned; but no provision is made for any payment into the treasury, nor for any payment of the fund in gross to the collector.

The words of the section, taken apart from any other section, afford no authority for a payment of the fund to the collector or into the treasury; and, that such a payment was not contemplated by the Act, is indicated by the fact that, while section 90 of the Act of 1799 does provide for a payment of the fund in gross, less costs and charges, to the collector, all reference to that section is omitted in the 31st section of the Act of 1866, and only section 91 mentioned; which section, while it fixes the shares, does not, as has been said, authorize any payment thereof to any but the parties entitled thereto, save only that one moiety is to be received by the collector for the use of the United States.

I arrive at the conclusion that the parties are entitled to payment directly from the registry of the Court, the

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more readily, because no reason has been suggested for sending the fund through the hands of various officers, none of whom, under the law, have any discretion as to its application, or derive any advantage from its disbursement. No duties or other charges are to be deducted from it, and nothing whatever, that I can imagine, would be gained from a different construction of the law, while much unnecessary delay and labor would be caused thereby to all the parties entitled to the fund.

My determination, therefore, is that no statute authorizes a payment of this fund otherwise than to the parties entitled thereto by law, and that the only lawful disposition of the fund which can be made by the Court is to pay one moiety to the collector of the port, for the use of the United States, one-fourth to the informer, and one-twelfth to the collector, for his own use, one-twelfth to the surveyor, and one-twelfth to the naval officer.

JANUARY, 1873.

IN THE MATTER OF THE PETITION OF THE
OWNERS OF THE STEAMBOAT CITY OF
NORWICH.

LIMITING LIABILITY OF SHIP OWNERS.—COLLISION.—PRACTICE.

A collision occurred between a steamboat and a schooner, by which both vessels were sunk. The steamboat was raised by her owners and repaired, after which various suits were brought against her in this Court in Admiralty, to recover damages for such collision. Those suits were consolidated, and, by order of the Court, one stipulation for the value of the steamboat was given in all. Subsequently her owners filed this petition, for the purpose of obtaining the benefit of the Act of March 8d, 1851 (9 *U. S. Stat. at Large*, 635), limiting the liability of ship owners, praying an appraisement of the value of the petitioners' interest in the steamboat and her freight, for that purpose. Objection was made on behalf of the parties who had claims against her:

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Held, That it was not necessary to the jurisdiction of the Court over this matter, that the Court should have possession of the vessel or her proceeds, or of a fund representing the proceeds, over which the Court had already obtained control, through the exercise of its ordinary jurisdiction;

That the pendency of the suits against the vessel, and the existence of the stipulation for value given in those suits, afforded no reason why this proceeding should not be taken, and that the petitioners were entitled to the order directing the appraisalment as prayed for.

A proceeding, to obtain the benefit of the Act in question, is not an action *in rem*, but is a proceeding *sui generis*, which partakes rather of the character of a suit *in personam*.

BENEDICT, J. This is a cause of limitation of liability promoted by the owners of the City of Norwich to exempt them from liability for the loss and damage resulting from a collision between that steamboat and the schooner General Van Vliet, which occurred in the Sound on the 18th of April, 1866.

The cause has been commenced by a petition which prays, among other things, that this Court would direct an appraisalment of the value of the interest of the petitioners in the said steamboat and her freight pending, to the end that a sum of money equal to the said value be paid into Court by the petitioners, or secured to be so paid by them, and they declared exempt from further liability, and that a monition issue against all persons claiming damages from any loss occasioned by said collision, citing them to appear before this Court and make due proof of their respective claims. Upon the presentation of this petition, notice of a time when the application for the order prayed would be made, was directed to be given by publication, at which time many persons, having demands arising out of said collision, appeared, but only for the purpose of calling the attention of the Court to certain aspects of the case, as it stands.

In behalf of these parties, the first proposition urged upon me is, that the jurisdiction of a Court of Admiralty over a cause of limitation of liability is dependent upon a prior possession of the vessel's proceeds, or a fund representing such proceeds over which the Admiralty

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Court has already obtained control through the exercise of its ordinary jurisdiction. This is claimed to have been decided by the Supreme Court in the case of *Wright v. The Norwich & N. Y. Trans. Co.* (13 *Wal.* 104).

I do not so understand that decision, and the law must be otherwise. As I read the opinion of the Supreme Court in the case referred to, the jurisdiction of the Admiralty over a cause of limitation of liability is there maintained, upon the ground that the subject-matter of such a cause makes it a cause of Admiralty and maritime jurisdiction within the meaning of the Constitution. It is the nature of the relief to the owner of a ship which determines the jurisdiction. The Supreme Court declares that a Court of Admiralty is better adapted to administer that relief than any other. "The District Courts, as Courts of Admiralty and maritime jurisdiction, have jurisdiction of the matter." The matter involved is the ascertaining of the extent of the liability of the owner of a ship, by reason of some occurrence in the course of the employment of the ship, and, unless that liability is proved to have been terminated by the total destruction of the ship without freight earned, apportioning among the creditors entitled thereto a sum equal to that liability, to which fund alone when paid into the registry the creditors can resort, and upon the payment of which or the surrender of his interest in his ship and her freight, the ship owner is entitled to be decreed exempt from all liability, in pursuance of the Act of 1851. The nature of the relief being sufficient to bring the cause within the jurisdiction of the Admiralty, it is not necessary that there should be prior suits in the Admiralty to recover such demands, nor a prior possession of the vessel or of any fund by the Admiralty Court under the ordinary process *in rem* of the Admiralty, or otherwise.

In England this jurisdiction is exercised by the Court of Chancery, and it there attaches upon the mere exist-

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ence of claims against the owner of a ship, against which he is entitled to relief under the limited liability Acts. The English Admiralty also has jurisdiction, but only by virtue of a statute which confers the jurisdiction when "the ship or her proceeds are under the arrest of the Admiralty." An actual possession of the ship or her proceeds, or "a state of things amounting to an equivalent for the arrest of the vessel," is, therefore, necessary to enable the English Admiralty to entertain a cause of limitation of liability. But we have no such statute in the United States, and the jurisdiction of the American Admiralty over such a cause is held by the Supreme Court to be conferred by the Act which, in creating the District Courts, gave them cognizance of all causes of Admiralty and maritime jurisdiction. The power so acquired, to be effectual, must be as ample as that exercised by the English Chancery in similar cases, and so the Supreme Court appear to intend.

It may well be, and indeed must be, in order to proceed to the final accomplishment of the result aimed at by the Act of 1851 that, in cases where there is any subsisting liability on the part of the ship owner by reason of an interest in a ship in existence, the Court must have the possession of the fund representing the value of that interest, upon the surrender of which the Act of 1851 transfers thereto all the rights of the creditors; but the jurisdiction of the Court cannot be dependent upon the possession of such a fund, otherwise it would follow that, when the ship is wholly lost and no freight earned, and consequently no fund to distribute, notwithstanding the Act exempts the ship owner in such a case, no Court of Admiralty could give effect to the Act; and, as the Supreme Court has decided the State Courts and the National Courts of law and equity to be without jurisdiction, the precise result would follow which the Supreme Court has sought to avoid—namely, a failure the Act for want of a Court to give it effect.

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It may not be amiss, in this connection, to notice that the relief given by the Act of 1851 may be sought under a variety of circumstances. There may be a ship left by the disaster in existence, which her owner has ready to be surrendered, free from all liens or demands other than those against which the Act gives relief. She may be in his possession ready to be surrendered, but encumbered with liens, arising prior to the accident against the result of which the ship owner asks to be protected. She may be in existence, but in the custody of a State Court under an attachment against the property of the owner, on one of the demands against which he is entitled to be relieved by her surrender. She may be in existence, but at the bottom of the sea, whence she cannot be raised except by an expenditure equal to her value, or at the bottom of a river whence she could be raised by a small expenditure, but one larger than her owner can make. Her freight may be in the hands of the ship owner ready to be surrendered, but it may also be in the hands of an irresponsible master; it may be still due from the freighter, and the right to it disputed by him in some other tribunal, or it may be in some foreign land. It will often occur, therefore, that there is no vessel in custody which will afford foundation for a proceeding *in rem*, and no fund to be paid into the registry of the Court; and yet the Act of 1851 intends that in all cases the ship owner shall obtain the relief afforded by the Act, when the value of his property put at the hazard of the voyage, proves insufficient to discharge the liability arising out of the voyage. While, then, in most cases, doubtless, the possession of a fund for distribution will give to the cause of limited liability the aspect of a proceeding *in rem*, it is not such a proceeding, but rather partakes of the character of an action *in personam*. It is a proceeding *sui generis*, quite analogous, in respect to the maritime adventure involved, and the liability which

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arises therein, to a proceeding in bankruptcy—a proceeding limited, of course, to the maritime capital involved, and resulting in a discharge of the owner from certain classes of demands to which he has become liable in the use of that capital. It is taken in the Admiralty by reason of the subject-matter, and is there to be conducted as the necessities of such a cause may require, in order to accomplish the result intended by the Act of 1851.

But, if the presence of a fund within the control of the Court of Admiralty were necessary to give that Court jurisdiction of a cause of limitation of liability, it is going far to say that it is also necessary that the Court should have acquired the prior possession of the fund by virtue of its ordinary Admiralty process. Even in England, where an arrest of the ship is by statute made necessary to give jurisdiction to the Admiralty, it has been held that “a state of things amounting to an equivalent for the arrest of the ship,” is sufficient to support the jurisdiction; and the deposit by the ship owner of a sum equal to the extent of his liability has been considered such an equivalent (*James v. The London & N. W. R. R. Co.* 26 *L. T. R.* 195; *The Northumbria*, 21 *L. T. R.* 683). Certainly then, in this country, where there is no such restriction as in England, the deposit of such a fund in the Court of Admiralty will support the jurisdiction of that Court to administer it. In this case there is such a fund tendered by the petitioner, and ready to be paid into Court when so directed.

Nor does the proposition that the possession of a vessel or her proceeds is necessary to give jurisdiction of a cause of limitation of liability derive any support from the Admiralty Rules of 1872. On the contrary, Rule 57 provides for the conduct of such a cause when the vessel has never been libelled, nor any suit brought in any Court of Admiralty, but only a suit against the owner in a court of law.

But it is further urged, that these petitioners are

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already in Court, because their vessel has been libelled in this Court, in an ordinary proceeding *in rem*, which is still pending. There is pending in this Court a proceeding *in rem* brought against the steamboat City of Norwich by some of the creditors, against whom the petitioners are asking now to be protected ; but that proceeding is no obstacle in the way of this proceeding. The only effect of the suit *in rem* is to fix this District as the one in which the cause of limitation of liability is to be taken by virtue of Rule 58. The Act of 1851, does not take away the right to institute a proceeding *in rem*, nor does it in any way interfere with the discharge of a vessel on bail in such suit, but it does permit the ship's owner thereafter to institute his cause of limitation of liability, and, upon complying with the statute, thereby to obtain a stay of all proceedings in the suit *in rem*, and thus in effect be released from any stipulation given in that suit. It is doubtless true, that if this vessel was still in custody, in the suit *in rem* pending against her, a transfer of her to a trustee appointed by this Court, in pursuance of the Act of 1851, would secure a transfer of the possession from that of the marshal to that of the trustee ; and it is no less true, that if a sum of money, representing the proceeds of a sale of this vessel in the suit *in rem*, was in the registry of the Court, that fund, or so much thereof as should be necessary, could be transferred to the credit of this cause to save trouble and expense ; and the probability that some such action would often be found convenient or necessary to prevent injustice, may have been one of the reasons for causing the pendency of a suit *in rem* to determine the District in which the cause of limitation of liability is to be taken ; but the two causes should not be considered as connected or in any sense dependent one upon the other. I think it would prove detrimental to all interests, if any effect be given to the Act of 1851, calculated to impair either the right of a lien creditor to seize the vessel by a proceed-

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ing *in rem* taken in time, or the right of the owner to obtain the discharge of his vessel from such seizure, by giving the ordinary stipulation for value, with a knowledge that by proper proceedings taken in a cause of limitation of liability, he can be relieved therefrom, when it shall appear that he is exempt from liability, either because the disaster which caused the loss resulted in the total destruction of his vessel without freight earned, or because he has in such cause surrendered all his interest in the ship and freight, and thereby transferred to such fund, all liability for the demand, to secure which until such time his stipulation for value was given. So, as I conceive, the Supreme Court have intended to be understood. It cannot well be supposed, that it has been intended to decide that the value of this steamboat, when seized in the suit *in rem* after she had been raised and repaired, is the limit of the liability of her owners, by reason of a disaster which occurred some time before. No such question appears to have been involved in the case before the Court.

These remarks dispose also of the further objection made, that the petitioners do not afford the Court of Admiralty, any case for the exercise of its jurisdiction, because they do not offer to bring in their vessel, nor pay into the registry the sum, at which her value was fixed in the suit *in rem*, nor do they admit that the stipulation for value given in the suit *in rem* may be subjected to the claims of those who are to be cited to appear in this cause. There is no fund in this Court, in the suit *in rem*, nor any stipulation there, such as is to be given in this cause, nor any necessity for any resort to the stipulation that was there given, to create a fund which might be transferable to this cause, nor was the value of the petitioners' interest in the vessel and her freight ever ascertained in that suit. An application was made to have that value ascertained in that suit, and to be permitted therein to give a stipulation for the

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amount of the owners' liability, and to pay in the freight; but the application was denied, on the ground that the proceeding to obtain relief under the Act of 1851 was a separate proceeding, and could not be taken as a part of the proceeding *in rem*. The stipulation which was afterwards taken in that suit does not purport to represent the amounts of the owners' liability, under the Act of 1851, and was not taken with any reference to the provisions of that Act. The action of this Court, in denying the application made in the suit *in rem*,* seems to be confirmed by the decision of the Supreme Court in the case of Wright, and accordingly this cause is now instituted. It is the first institution of such a cause by these petitioners, and it is to be conducted as a cause by itself, in which the petitioners, if they succeed, may obtain a decree exempting them from liability, and restraining any further action in the suit *in rem*, pending in this Court, as well as in the other actions pending against them elsewhere.

I am unable, therefore, to see why, as this cause now stands, the petitioners are not entitled to an order directing an appraisement of the value of their interest in the City of Norwich, and her freight, pending the proceedings, and it is accordingly referred to a commissioner of this Court to hold such appraisement, and report to this Court the said value and amount. Notice of the time and place of such appraisement will, of course, be given to any parties who may duly enter their appearance in this cause.

For the petitioners, *J. W. C. Leveridge*.

In opposition, *Martin & Smith* and *H. C. Place*.

* See 1 *Benedict Rep.* 89.

In the Matter of Edward T. Wood, a Bankrupt.

Southern District of New York.

FEBRUARY, 1873.

IN THE MATTER OF EDWARD T. WOOD, A BANKRUPT.

AMENDING PETITION.

A bankrupt's petition, which was filed in February, 1868, alleged only that he "had a place of business in New York." In February, 1873, he asked to file an amended petition, in which the words, "and has there carried on business of his own," were added:

Held, That the amendment could not be allowed, as the words "business of his own" are not found in the Act; but that the application to amend might be renewed, on an affidavit showing the facts and the reasons why the amendment was not asked for sooner.

THE petition in this case was filed February 29th, 1868. It stated that the petitioner "had a place of business in New York." In February, 1873, the petitioner asked to file an amended petition, in which the following words: "and has there carried on business of his own," were added to the above allegation.

BLATCHFORD, J. The amendment asked cannot be granted in the form proposed. The words, "business of his own," are not found in the Act. The motion may be renewed on notice, on an affidavit showing the existence, at the date of filing the petition, of the facts specified in section 11 as necessary to give jurisdiction, setting forth specifically the words proposed to be stricken out and those proposed to be inserted, and the reasons why the petition was not made originally in the proper form, and the reasons why the amendment was not applied for sooner after the filing of the specifications.

FEBRUARY, 1878.

THE STEAMBOAT ANNA AND THE STEAM-
BOAT CARRIE.

COLLISION IN HUDSON RIVER.—VESSEL AT ANCHOR.

A schooner, lying at anchor off Caldwell's, in the Hudson river, was sunk by a collision with a tow, which passed her in the night. Her owners filed a libel against two steamboats, which, fastened alongside each other, had towed some boats by the schooner that night. The schooner alleged that she was struck first by one of the two steamboats and then by the boats in tow. The steamboats alleged that, while there was a slight collision between one of them and the bowsprit of the schooner, the blow which did the injury to the schooner was given by the boats of another tow, which passed up the river ahead of them:

Held, That, on the evidence, the schooner had failed to establish that the blow which caused her to sink was inflicted by the two steamboats or the boats in tow of them, and that the libel must be dismissed.

THIS was a libel by the owners of the schooner Tryall, to recover for the sinking of the schooner in the Hudson river, off Caldwell's, on the night of December 18th, 1870. The schooner was at anchor. Her story was, that the Anna, with the Carrie alongside, and having a tow of boats astern, came up the river and attempted to pass between the Tryall and the west shore, and that the Carrie struck the schooner and went by her, and the boats in tow also struck her, and that from the effects of such collision she sank. The story of the Anna and the Carrie was that a tug was going up ahead of them with a tow of boats astern; that those boats struck the Tryall; and that, after she got free from them, she swung around so that her bowsprit just touched the paddle-box of the Carrie, but not with force enough to do any injury.

For libellants, *R. D. Benedict*.

For claimants, *C. Van Santvoord*.

The Steamboat Anna and the Steamboat Carrie.

BLATCHFORD, J. A careful consideration of the evidence in this case fails to satisfy me of the truth of the allegation of the libel, that the steamboat Carrie struck the libellants' schooner and carried away her bowsprit, and that afterwards a barge in tow of the two steamers struck the port bow of the schooner, and that the two collisions did so much injury and damage to the schooner that she sank. That the schooner was at anchor, and was struck and sunk, is undisputed. It is also not denied that the Carrie came in contact with the jib-boom of the schooner. But, the collision described by the master of the schooner as the first one of the two collisions, is described by him as a blow by the guard of a boat on the round of the port bow of the schooner, in a direction which took the schooner's bowsprit square off to the bow. The evidence satisfactorily shows that no such blow was given by the Carrie. Then, again, it is very apparent that the two blows which did the damage were given by a vessel and her tow, which, to the eyes of the men on the schooner and on the sloop to the westward of her, was the first tug and tow in order which came up from below. That there was such a tug and tow just ahead of the Anna and the Carrie and their tow cannot be doubted. It was this first tug and tow that hit the schooner and did the damage. This first tug, or a barge alongside of her, first hit the schooner, and then a boat in the hawser tier behind, in tow of such tug, hit the schooner. These blows, so disastrous, naturally caused excitement, and the passage of the Anna and Carrie close behind was not noticed by those on board of the schooner and the sloop. The witnesses all, on both sides, say that it was the first tug and tow that hit the schooner, and did the damage. That was not the Anna and the Carrie. The contact with the Carrie did no damage. On this view the testimony can all be reconciled. On any other view, wilful false swearing must be imputed to the claimants' witnesses.

The libel must be dismissed, with costs.

FEBRUARY, 1873.

IN THE MATTER OF FRANK F. NEWLAND, A
BANKRUPT.SECURITY FOR DEBT.—INSURANCE ON BANKRUPT'S LIFE.—PRESENT
VALUE OF POLICY.

N., having borrowed money of his mother-in-law, gave her his notes for it, and, as security for them, procured a policy of insurance on his life to the amount of \$4,000, for her benefit, and paid the premiums on it up to the date of his bankruptcy. On a surrender of the policy, she would be entitled, in its stead, to a paid up policy for \$158. The cash value of the policy, at the date of the bankruptcy, if surrendered, was \$13 13. The mother-in-law proved her debt, to the amount of \$3,450, setting forth the security:

Held, That, in order to ascertain the amount on which she was entitled to dividends from the estate, the cash value of the policy, if surrendered, viz., \$13 13, should be deducted from the amount of the debt, as proved.

BLATCHFORD, J. The petition in this case, a voluntary one, was filed on the 16th of April, 1872. Mrs. Van Antwerp, the mother-in-law of the bankrupt, has proved a debt against his estate, on promissory notes made by him, and held by her, for \$4,000, the consideration for which was money loaned by her to him, the amount of the debt proved being \$3,450, there having been \$550 paid on account of the \$4,000. On the 16th of April, 1870, the bankrupt took out a policy of insurance on his own life, in a life insurance company, for \$4,000, for the benefit of Mrs. Van Antwerp, payable to her, as collateral security for said debt, and paid the quarter-yearly premiums, \$19 84 each, up to the date of his bankruptcy. On the surrender of this policy, the company would, by its terms, issue, in its stead, a paid up policy for \$158. At the present age of the bankrupt, it would require the payment now of a single premium of \$49 99, to purchase a paid up policy in the company for \$158. The cash value of the \$4,000 policy, on a surrender of it to the

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company, is \$13 13. The proof of debt sets forth the security.

Two questions are certified by the register as arising on the foregoing facts: (1.) Whether the assignee in bankruptcy can require Mrs. Van Antwerp either to surrender the policy to him and take a dividend on all her claim, or to retain the policy and withdraw her proof of debt. (2.) If such election on her part cannot be required, what shall be taken as the value of the collateral security to be deducted from the debt, so as to arrive at the amount on which Mrs. Van Antwerp is to receive a dividend from the estate?

It is contended, on the part of the assignee, that, as the bankrupt took out the policy, and for two years paid the premiums, the assignee has a claim to whatever surplus of the amount insured there may be, after paying the debt due Mrs. Van Antwerp, and that she could not retain such surplus, as against the assignee; that the payment of the amount insured will pay her debt; that dividends to her must cease when the amount insured is paid; and that, if she shall receive dividends on the \$3,450, or on that amount less the \$13 13, or less the \$158, and then the amount insured shall be paid, she will have received the dividends, and the \$3,450 in addition. Hence, the assignee insists, that Mrs. Van Antwerp ought to surrender to the assignee her interest in the policy, and prove her claim for the \$3,450, as a debt unsecured, or else look to the policy as full security, and relinquish all claim on the assets of the estate.

For the creditor, Mrs. Van Antwerp, it is contended, that this policy, the bankrupt being alive, has now no fixed, definite value, other than its present cash surrender value of \$13 13; that, outside of that, everything is contingent, as well the continued payment of the premiums, as the duration of the life insured, and the continued solvency of the company; that, if the future payments of premiums shall be made by the creditor, she

will be giving to the policy all its value ; that the future payments of the premiums may be made by the bankrupt, out of after acquired property, if he does not thereby contravene any provision of the bankruptcy Act ; that it would not be equitable to require the creditor to deduct from her claim more than the present cash surrender value of the policy ; that such value is the entire present value produced by the payments of premiums by the bankrupt ; that the entire security which the bankrupt has furnished to the creditor, by making such payments, is the present cash surrender value of the policy ; that the contingencies before mentioned make it impossible to consider the present value of the policy as being \$4,000 ; that the \$158, as the amount of a paid up policy which would now be issued for the premiums already paid, ought not to be taken as the present value of the \$4,000 policy, because of the contingencies as to the duration of the life insured and as to the continued solvency of the company ; and that, consequently, the only certain present value is the \$13 13 cash surrender value.

The questions involved are ones as to which no direct authorities are to be found, either in England or in the United States. It is well settled, that where a debtor, at his own expense, effects an insurance on his life, as security to a creditor, the representative of the debtor is entitled to the surplus after the debt is paid. So, too, if such a debtor, in his lifetime, pays the debt, he is entitled to have the policy delivered up to him (*Lea v. Hinton*, 5 *De G. M. & G.* 82 ; *Drysdale v. Piggott*, 22 *Beavan*, 238 ; *Courtenay v. Wright*, 2 *Giffard*, 337 ; *Morland v. Isaac*, 20 *Beavan*, 389).

The policy of insurance, as a security, is not, within the language of section 19 of the bankruptcy Act, "a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt" owing to the creditor from the bankrupt ; but, nevertheless, the creditor must, in some proper way,

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credit on the debt the present value of the security. It seems to me impossible to say that the present value of the policy is more than its cash surrender value. But for its having such cash surrender value, it could not be said to have any appreciable value (*Parker v. Marquis of Anglesey*, 20 *Weekly Reporter*, 162, and 25 *Law Times Rep. new series*, 482). It is true, that the bankrupt paid the premiums for two years, but that has given no present appreciable value to the policy other than its cash surrender value. It is true, that, if the policy were now due, the creditor could not hold, as against the assignee, the surplus beyond her debt. But, it may require the payment of the premiums for many years, before the death of the person insured will make the policy due ; and those premiums, with the accumulating interest on the debt, may, with the debt, amount to a sum much larger than the amount of the policy. It would not be proper, even if the creditor should so desire, to compel the assignee to assume the payment of the premiums on the policy for the future. In fifty years, and the assured may live that length of time, the premiums, not calculating interest on them, would amount to about \$4,000. Besides, the estate could not be kept unsettled, to carry this policy ; and, if the assignee took it now, it would now be worth to him, to dispose of, in its present shape, no larger sum than its cash surrender value. That amount he is entitled to have allowed at once on the debt, the balance of it being proved. It is not proper to require the creditor to prove for nothing and look to the policy alone, because the policy is now worth only the \$13 13.

In every view, the first question must be answered in the negative, and the value of the policy, to be deducted from the debt, must be taken at \$13 13.

James Clark, for the creditor.

David Thornton, for the assignee.

The Steam Propeller Titian.

FEBRUARY, 1873.

THE STEAM PROPELLER TITIAN.

COLLISION IN LONG ISLAND SOUND.—STEAMER AND SCHOONER.—
LIGHTS.

A steamer and a schooner came in collision at night in Long Island Sound. The wind was southwest, and the schooner was heading east, and making nine or ten knots an hour. The steamer was heading west by south, making five or six knots an hour. The schooner made no change in her course. When the lights of the steamer were first seen a little on the starboard bow of the schooner, the latter showed a torchlight on that side, and afterwards showed it again shortly before the collision. The master of the steamer saw the torchlight, a little on the port bow of the steamer. He also, at the same time, saw a red light and several bright lights apparently on a steamer on his port hand. He ported for a little time, and then straightened up on his course again, and, on seeing the torchlight again on his port bow, ported again, as he said, because the pilot whom he had on board said it must be on a pilot boat, and he did not wish to be spoken; and, on the re-appearing of the torchlight a third time, still on his port bow, he put his helm hard a-port and stopped his engine, and then, seeing the schooner's green light, reversed it, but too late to avoid the schooner, which was struck on her starboard side and sunk:

Held, That the steamer was bound to have kept out of the way of the schooner; That the steamer was in fault in porting on first seeing the torchlight but a little on her port bow, without anything to indicate which way the vessel showing it was proceeding, and in following up the schooner, as she did, by repeated portings, instead of starboarding or stopping until she found which way the schooner was going.

BLATCHFORD, J. This libel is filed by the owners of the schooner Daniel Williams, on their own behalf, and on behalf of the owners of cargo and other property which was on board of said schooner, to recover the sum of \$53,000, as the damages sustained through the sinking of said schooner by a collision which took place between her and the steam propeller Titian, between ten and eleven o'clock, P.M., on the 6th of December, 1871, in Long Island Sound, a short distance to the eastward of Little Gull light. The schooner was bound from New

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York to Boston. The steamer was on a voyage from Cape Breton to New York. The sky was overcast, but the atmosphere was clear, and there was no difficulty in seeing lights. The wind was southwest, and the schooner was making nine or ten knots an hour, with her foresail, mainsail, jib, flying jib, and fore gaff-topsail set. The steamer was making five or six knots an hour.

The story of the libel is, that the schooner was sailing on a course nearly or quite due east, when those on board of her discovered a bright light, apparently the masthead light of a steamer, a little over the starboard bow of the schooner, and which they supposed to be on a steamer approaching and bound west; that thereupon the master of the schooner showed a lighted torch on the starboard side of the schooner, and the vessel bearing said light approached, and, as she approached, bore further aft on the starboard side of the schooner, and soon exhibited her green light to the schooner; that, about this time, the torch so exhibited began to grow dim, and the master of the schooner, although it then appeared to him that the approaching vessel was designing to pass, and would pass, the schooner at a safe distance on the starboard side, nevertheless went below, and redipped and relighted his torch, and again exhibited it as before; that, just as he went below for that purpose, the approaching vessel showed her starboard light, and, when the master of the schooner again came on deck, the said vessel, which proved to be the steam propeller Titian, was coming up and directly upon the schooner, and did come upon her, striking her a square and heavy blow just forward of the main rigging, and crushing in her starboard side, so that she speedily sank, one of her crew going down with her, and being drowned; that the schooner, besides exhibiting such torchlight, had colored lights set, according to law, and the same were burning brightly; that, at all times, from a considerable period of time before the masthead light of the Titian became visible to

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those on board of the schooner, down until the collision, the schooner kept her course without change; that the collision was wholly caused by the improper and unseamanlike conduct of those in charge of the Titian; and that they saw one, at least, of the colored lights of the schooner, and also the said torchlight, in ample time to enable them to take the requisite precautions to prevent the collision.

The answer sets forth, that the Titian had on board an experienced Long Island Sound pilot; that the wind was southwest, blowing a ten-knot breeze, and the night dark and cloudy, with a clear horizon; that the Titian was steering west by south; that her master and the Sound pilot were on the bridge, two men were at the wheel, and one man was on the lookout; that the speed of the Titian was about five knots an hour; that her master and her pilot observed "a red and several bright lights" on her port bow, "and also a flare-up light close to Gull Island light," and almost at the same moment the lookout reported "said light on the port bow;" that the vessel with the flare-up light, if she had continued an east course, would have passed on the Titian's port bow; that the helm of the Titian was ported, and her course headed to the northwest, and the master and pilot, seeing that "said light" was a good distance on their port side, and seeing no sign of any flare-up light, changed the course of the Titian from northwest to her original and true course of west by south, and some time thereafter a flare-up light was again seen by those on board of the Titian, about two points on her port bow; that the vessel with the flare-up light, if she had continued an east course, would have passed on the Titian's port bow; that the helm of the steamer was again ported, to give "said vessel with the light" abundant room, and, "the light approaching," the helm was put hard a-port, and the engines were stopped and reversed full speed, and then, for the first time, a dim green light was observed

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on the approaching vessel, the fact being, that the schooner had starboarded her wheel, and changed her heading, to cross the Titian's bow ; that, at the moment the green light was observed, the Titian was three points off her course, and was heading northwest by west ; that, in about a minute after the green light on the schooner was observed, the vessels collided, the schooner striking the Titian about five feet abaft her port bow ; that, at the time of the collision, the headway of the Titian was nearly stopped, and she was barely moving through the water, heading northwest by west, while the schooner was right before the wind, heading northeast ; that the collision was occasioned solely by the ignorance and want of skill of the master and crew of the schooner ; that the collision was the fault of the schooner, in not keeping on her proper course, in starboarding her helm, and in not having proper lights set and burning brightly ; and that the schooner was not properly provided with steering apparatus.

It is impossible not to remark the confused statements of the answer. From them, it cannot be ascertained, whether it was a red light, or a flare-up light, that was reported by the lookout, or what light he reported ; or whether, on " the vessel with the flare-up light " any other light was seen by the Titian at the same time that the Titian saw on that vessel the flare-up light ; or what light it was which was seen a good distance on the port side of the Titian at the time no sign of any flare-up light was seen ; or when the flare-up light which had been seen had disappeared. A motive for the confused and indefinite statements in the answer may, perhaps, be found in the fact, that the lookout on the Titian had been examined by a deposition in writing on the 15th of December, 1871, as a witness on the part of the libellants, and that the master of the Titian had been examined by a deposition in writing on the 21st of December, 1871, as a witness on the part of the claim-

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ants, and that the answer was sworn to on the 13th of January, 1872. The lookout, Diez, who was on the top-gallant forecastle, testifies, on his direct examination: "Q. Did you see the schooner, or her lights, before the collision? A. Yes, sir; I saw the light. Q. What lights did you see? A. I saw a green light and a flash light. Q. How long before the collision did you see these lights? A. I can't tell exactly. I think it was near ten minutes. Q. What did you do, if anything, upon seeing the lights? A. I reported them. Q. Do you recollect whether you saw the green light or the flash light first? A. I believe it was the green light I saw first. I could not make out what light it was first. My belief was it was the green light. It was too far off first. Q. How did you first report it—what did you say? A. A light a little on the port bow. Q. Did you afterwards see that light nearer, so as to make out what it was? A. Yes, sir. Q. And what was it? A. A green light. Q. Did you report it more than once? A. No, sir. Q. When you reported it, was any response made? A. I did not hear any answer. Q. Was it afterwards reported again by anybody? A. Not that I know. Q. How soon after you first saw the light did you see the flash light? A. I can't tell exactly. Q. State how the vessels came together? A. The schooner came very near across our bow, so that we struck her about amidships, on the starboard side, about a square blow." On cross-examination, he testified: "Q. Can you tell me which light you first saw on the schooner? A. The first I saw I could not make it out what light it was, but I believe it was the green light. Q. On which side of the schooner did you see the light? A. It was on the starboard side of the schooner. Q. On which side did you see the flash light? A. It must have been on the starboard side. I could not see it on the port side. The sails were on that side. Q. Can you tell me what time passed between the time you saw the first

and second light on board the steamer? A. There was not much time; a short little while."

The master, Buchanan, was on the bridge, 123 feet abaft of the stem of the vessel, in a less favorable position than Diez was for making out what the uncertain light was which Diez says turned out to be the green light of the schooner. The master testifies, that, while on the bridge, he observed "a red and several bright lights, apparently a steamer, and a flare-up light, close to Gull Island light;" that he ported, and stood to the northward for some little time; that, "observing the red light to be a good distance on the port side, and no signs of the flare-up light," he "kept the steamer on her course again;" that, about ten minutes afterwards, he saw the flare-up light again, about two points on the port bow; that he asked the Sound pilot what was the meaning of the flare-up lights, and received the reply that it must be a pilot boat; that he ported the helm; that the flare-up light showed again, evidently closing; that he ordered the helm hard a-port, and turned the telegraph to stop, and then, for the first time, seeing a green light, turned the telegraph to reverse full speed; and that the lights closed rapidly, the sails of a schooner could be made out, and the vessels collided. The master also says, that his first porting brought the vessel to northwest, a change of five points, she having been heading west by south; that, when the flare-up light was seen the second time, it appeared to be a safe distance on the port side; that he then ported again, because he had a Hell Gate pilot on board, in addition to the Sound pilot, and, thinking that the flash light was a pilot boat, wanted to keep clear of her, so as not to be asked to take a pilot from her; that, when he saw the green light, the steamer must, by the hard a-porting, have been two points off her course, but he does not speak from seeing the compass; that, immediately before he put his helm hard a-port, the light on the

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schooner bore nearly two points on his port bow ; that, at the time of the collision, the Titian must have been heading north of northwest, which would be more than five points off her course of west by south ; that the schooner was, at that time, right before the wind, heading northeast ; that the flare-up light appeared three times, and disappeared twice ; that "the flare-up light" was reported by the lookout, almost simultaneously with its being seen by the master ; that the report of the flare-up light was, "a light on the port bow ;" and that he heard no other report from the lookout of any light, after that, and before the collision.

The purport of the testimony of Diez is plainly, that he reported a light but once ; that no other report of any light was made ; that the light in reference to which he made the report was not a flash light ; and that his report was "a light a little on the port bow." I do not understand the testimony of Diez as expressing a doubt as to whether the first light he saw was a green light or a flash light, but I understand it as meaning that his doubt was whether the first light he saw was a green light or a red light, and so a doubt whether such first light was on the starboard side or the port side of a vessel. When he first saw the first light, he could not make out clearly what it was, as between a green light and a red light. Whatever it was, he reported it merely as "a light." But, when the light he so first saw and so reported came nearer, he saw it to be a green light. When he saw the flash light, he recognized it as a flash light, that is, a white light, and not a colored light, and never had any doubt that it was a flash light, and never supposed it was a colored light.

The master of the Titian admits, that the report of Diez was merely "a light on the port bow," and that that was the only report there was, and yet the master calls such report a report of a "flare-up light," because he himself, 123 feet abaft the stem, saw a flare-up light

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almost at the same time, and saw no green light at that time. He saw a red light and several bright lights, all apparently on one and the same vessel, and that a steamer. That would indicate a steamer coming from the westward, and on his port hand. He also saw a flare-up light. If such flare-up light was on a vessel other than such steamer, he could tell nothing as to the direction in which such vessel was going, because he saw no colored light or lights on her. But he ported and stood to the northward for a little time. This brought the red light of the steamer coming from the westward (for there was one), a good distance on the port side. The flare-up light was no longer seen. He then stopped porting. He afterwards saw the flare-up light again, on his port bow, and, although he regarded it as being at a safe distance on his port side, he ported again, because the Sound pilot said the flare-up light must be on a pilot-boat, and he, the master, did not wish to be bothered by having the pilot-boat speak him; that then the flare-up light disappeared; that afterwards the flare-up light re-appeared on his port bow, and he then put his helm hard a-port, and stopped his engine; that then, for the first time, he saw a green light; and that he then reversed at full speed, and saw the sails of the schooner, and the vessels struck. Such is the story of the master of the Titian.

The great discrepancies between the accounts given by the lookout and the master need no observation. Such accounts are both of them entirely variant from anything that can be made out from the answer; and they serve to show why, with the stories of Diez and of the master spread upon paper, the claimants, finding it impossible to tell what the real truth was, put in the confused and uncertain answer which has been referred to. Moreover, the testimony of the master is a wide departure from the answer. The master distinctly gives it to be understood that it was the flare-up light which

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was reported; and that when, after porting the first time, he ceased to port, he did so because the red light of the steamer coming from the westward was a good distance on the port side, and because the flare-up light, so reported, and which he had seen, had disappeared. The answer says, that the light which had opened to a good distance on the port side, by the first porting, although not the flare-up light, was the light which the lookout had reported. In this view, if the light which had so opened, by the porting, was the red light of the steamer coming from the westward, the answer would mean that the light which the lookout reported was the red light of such steamer. Yet the master expressly testifies that the light which the lookout reported was the flare-up light.

Much cannot be said in favor of the management of a steamer which, seeing a flare-up light, apparently on a vessel, and but a little on the port bow, ports her helm, without anything to indicate which way the vessel showing the flare-up light is proceeding. Then the master steadies, after porting, and the light disappears, but he soon sees it again about two points on his port bow, and then ports again, and the light disappears, but he does not shake it off, and it appears the third time, no farther off than nearly two points on his port bow, and then he puts his helm hard a-port, and runs over the vessel that carries such light. How was this done? Manifestly, from the evidence, in this way. The flare-up light was first seen, before the first porting, but a little on the port bow of the Titian. The Titian and the schooner were approaching each other nearly end on. The Titian then ported. The master says that such first porting carried her to northwest, and that he then kept her on her course again. But there is no satisfactory evidence that she got back to her original course. If she did not get back from northwest more than two points she would still have the flare-up light two points on her port bow,

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as the schooner was heading east. Then, further porting, with the flare-up light, when seen, always on the port bow, brought the Titian so as to head, at the collision, to the north of northwest, while the schooner was still proceeding east. This accords with the story of the libel, which is fully supported by the witnesses from the schooner. The schooner kept an east course steadily, and did not change, and the steamer persistently followed the schooner up, by porting, instead of starboarding, or of stopping, without altering her helm, until she could tell which way the vessel with the flare-up light was proceeding.

The Titian was bound to keep out of the way of the schooner, or to show a satisfactory excuse for not doing so. The only excuse set up is, that the schooner changed her course, and that excuse is not made out.

There were two steamers going to the westward at the time and place of this collision. The schooner insists that the Titian was the most southerly one of these two steamers, and was on the starboard hand of the schooner, and that the most northerly one of these two steamers was on the port hand of the schooner, and passed by to the westward after the collision. The counsel for the claimants advanced the theory, on the trial, that the Titian was the most northerly one of these two steamers, and that the schooner collided with a steamer which was always seen off the port bow of the schooner, in order to make out that the schooner must have changed her course, so as to be struck on her starboard side by a steamer which was seen off her port bow, and which kept porting. The advancing of such a theory, in the face of the evidence, shows a weakness on the part of the defence, which is a virtual confession of fault. The master of the schooner says, that the most northerly one of the two steamers passed him after the collision, perhaps half a mile off, while he was in the water. The master of the Titian destroys this theory of

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the claimants, in saying that he saw two other steamers, one going to the east, which passed on his port side, and one, shortly before the collision, on his starboard quarter. If the Titian was the most northerly steamer of the two going to the west, she should have seen a steamer on her port quarter, going to the west. The pilot of the Titian testifies, that there was a steamer going to the westward, behind him and a short distance to the northward of him, and that she passed him after the collision. In the face of this testimony, to urge that the collision was with the more northerly steamer, is to contend that the collision was not with the Titian.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages.

J. C. Carter, for the libellants.

W. C. Barrett and *C. Donohue*, for the claimants.

FEBRUARY, 1874.

JOHN S. BEECHER, ASSIGNEE IN BANKRUPTCY
OF ABRAHAM B. CLARK, *v.* GEORGE D. H.
GILLESPIE, EXECUTOR, &c., OF THOMAS L.
CLARK, ABRAHAM B. CLARK, ISABELLA
CLARK, AND THE CITIZENS' SAVINGS BANK.

WILL.—VESTED REMAINDER.—NOTICE OF BANKRUPTCY PROCEEDINGS.

In 1853 the will of T. L. C. was admitted to probate. It made G. executor, and by it all the property of T. L. C. was given to his executor, to be sold and converted into money, and the proceeds invested. The executor was to apply the income to the use of the wife of T. L. C. during her life. On her death, the executor was to stand possessed of \$10,000 of the principal, in trust for a

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niece, and the rest he was to pay over and divide among several persons named (one of whom was A. B. C.), "their heirs, executors, administrators, and assigns forever, in equal shares, as tenants in common, *per capita*, the issue of any such person named who may be then dead, to take his or her deceased parent's share." On December 22d, 1869, A. B. C. was adjudged a bankrupt, and on January 22d, 1870, an assignment in bankruptcy was executed to B. The widow of T. L. C. died in April, 1872, and G. then proceeded to close up his trust, and the share to go to A. B. C., who had survived the widow, was \$3,249 27. G. drew his check for that amount, dated May 11th, 1872, in favor of A. B. C., and gave it to his counsel, C., to give to A. B. C. C. had had actual knowledge of the fact that A. B. C. had been adjudged a bankrupt, and that B. was his assignee. He delivered the check to A. B. C., and took from him a release of the executor. On the 17th of May the check was deposited in a savings bank to the credit of the wife of A. B. C., with other moneys. On the 16th of June, the savings bank was notified by B. that he claimed the money, as assignee of A. B. C., and, on the 20th of June, B. filed this bill in equity against all the parties, to recover the money:

Held, That, under the will, A. B. C. had a vested interest in the money at the time of the adjudication in bankruptcy, which was part of his estate, and passed to his assignee, and it made no difference whether G. had any actual notice of the bankruptcy proceedings or not. That G. was chargeable with notice of the bankruptcy proceedings, by reason of the actual knowledge of them by his counsel, C., even though such knowledge did not recur to the mind of C. at the time of the delivery of the check;

That no title to the money had passed to the wife of A. B. C., or to the savings bank;

That the bank was entitled to deduct its costs from the fund, and must pay over the remainder, and that B. was entitled to a decree against G. and A. B. C. for the amount of the check, less the amount so paid over by the savings bank.

BLATCHFORD, J. On the 31st of March, 1848, Thomas L. Clark executed his last will and testament. It was duly proved as a will of real and personal estate, before the Surrogate of the county of New York, on the 5th of October, 1853, and on the same day letters testamentary thereon were granted to the defendant George D. H. Gillespie, one of the executors named therein. The will, after giving two legacies of money, proceeds: "I give, devise, and bequeath to the executors and trustees in this my last will and testament named, and the survivor of them, or unto such one or more of them as may take upon themselves or himself the burden of the execution of this my last will and testament, his or their heirs, ex-

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executors, administrators and assigns forever, upon trust, for the purposes of this my will, all my real estate, lands, tenements and hereditaments, whether in possession, reversion, remainder or expectancy, and all my personal estate of what nature or kind soever, not before disposed of, upon trust, to receive the rents and profits of the same hereditaments, and to recover and receive such personal estate as soon as conveniently may be, and to sell and dispose of and convey all and singular my said real estate, by public auction or private contract, unto any person or persons who shall become and be the purchaser or purchasers thereof, for the most money that can reasonably be had for the same, and to receive the moneys for which the same shall be sold ; * * * and I will and direct my said trustees and executors to invest the proceeds of my personal estate, and the moneys arising from the sale of my real estate, after payment of all my just debts, and of the aforesaid legacies, in Government or real securities, or in bank or other stock, with power, from time to time, to alter and transpose such securities or stocks, at their discretion ; and, as to the dividends, interest and income to arise from the said stocks, funds and securities, and the rents and profits of my said real estate, to be received by my said executors, I direct that my said trustees and executors do and shall apply the same to the use of my said wife, to and for her own sole benefit, for and during her natural life ; * * * and, from and immediately after the decease of my said wife, I will and direct that, as to ten thousand dollars of the principal moneys to be invested as aforesaid, my said executors and trustees shall stand possessed of the same, in trust, to apply the interest thereof to the use of my niece, Mary Ann, the wife of my executor George D. H. Gillespie, for and during her natural life ; * * * and, as to all the rest and residue of the said principal moneys to be invested as aforesaid, I will and direct, that, from and immediately after the decease of my said

wife, my said executors and trustees shall pay over and divide the same unto and among my nephews and nieces William N. Clark, Catharine Ann Wolfe, Edwin Clark, Daniel S. Clark, and Richard Smith Clark, the children of my brother John Clark, and Abraham B. Clark, Richard M. Clark, and Mary Addoms, the children of my brother Richard S. Clark, their respective heirs, executors, administrators and assigns, forever, in equal shares, as tenants in common, *per capita*, the issue of any such child of either of my said brothers who may be then dead, to take his or her deceased parent's share."

On the 22d of December, 1869, the defendant Abraham B. Clark, named in the will as a child of Richard S. Clark, was adjudged a bankrupt by this Court. The plaintiff was appointed his assignee, and, on the 22d of January, 1870, an assignment under the bankruptcy Act, in the usual form, was executed to the plaintiff.

The widow of Thomas L. Clark, the testator, died in April, 1872, and the defendant Gillespie then proceeded to close his trust. After providing for the \$10,000 set apart for the use of his wife, he ascertained the balance left for distribution to be \$25,994 14. Of this sum, one-eighth, or \$3,249 27, was to go to the defendant Abraham B. Clark, who survived the widow. The entire fund was on deposit in a bank to the credit of the defendant Gillespie, as executor. A check on such bank for \$3,249 27, drawn by the defendant Gillespie, as executor, payable to the defendant Abraham B. Clark, or order, and dated May 11th, 1872, was, by the direction of the defendant Gillespie given to the defendant Abraham B. Clark. He signed a release to the executor, on receiving the check, on the 16th of May, 1872. He also indorsed his name on the check. The check, so indorsed, was, on the 17th of May, 1872, deposited in the bank of the defendants the Citizens' Savings Bank, to the credit of the defendant Isabella Clark, the wife of the defendant Abraham B. Clark, and formed part of a sum of \$3,250 credited by

said bank to her account that day, as deposited to her credit that day. The check for \$3,249 27 was collected by the Citizens' Savings Bank. On the 6th of June, 1872, Isabella Clark had on deposit to her credit in the said savings bank \$4,290. On that day she withdrew from it \$76, leaving \$4,214. On the 16th of June, 1872, the said savings bank were notified, in writing, by the plaintiff's attorneys, that the check referred to was obtained by the fraud of Abraham B. Clark, that said Clark was adjudged a bankrupt on the 22d of December, 1869, and that they were requested to retain the proceeds of the check to abide such formal claim as might be made upon them. The bill in this suit was filed on the 20th of June, 1872. The savings bank has allowed interest to Isabella Clark, on her deposits, at the rate of six per cent. per annum. On the 1st of July, 1872, the bank credited her account with \$32 25 interest, and, on the 31st of August, 1872, she withdrew from the bank \$996, leaving to her credit there \$3,250 25. All the other legacies provided for by the will have been paid, and all the other legatees have given releases to the defendant Gillespie.

The bill alleges that the defendant Gillespie, although knowing of the insolvency of Abraham B. Clark, and having notice of the appointment of the plaintiff as his assignee, and of the title of the plaintiff to the legacy, placed the amount of the legacy in the hands of Abraham B. Clark; and that Abraham B. Clark, with intent to defraud the plaintiff, and to prevent the said sum from coming to the plaintiff's possession, fraudulently placed it in the hands of the Citizens' Savings Bank, and caused the bank to enter it on its books as a sum deposited with the bank by his wife, the defendant Isabella Clark.

The bill prays for a decree that the plaintiff is entitled to the amount of the legacy, and the interest thereon, and that the defendants may be decreed to ac-

count for and pay the same to the plaintiff; that Abraham B. Clark and his wife may be enjoined from collecting the amount of the legacy, or the proceeds thereof, from the savings bank and from Gillespie; and that the bank and Gillespie may be enjoined from paying the amount of the legacy, or the proceeds thereof, to any other person than the plaintiff.

The answer of Gillespie avers, that, not knowing that Abraham B. Clark was insolvent, or that the plaintiff was his assignee in bankruptcy, and having had no notice thereof, he, in good faith, gave the check to Abraham B. Clark. It denies the right and title of the plaintiff to the money, and avers, that, if the fund belongs to the plaintiff, the savings bank should be decreed to pay the amount deposited with them, with interest thereon, to the plaintiff, they holding the same in trust for the account of Abraham B. Clark.

The answer of Abraham B. Clark and his wife avers that the legacy was rightfully paid to Abraham B. Clark; that, under the will, he was the only person entitled to it; that the plaintiff never had any right, title, or interest in it, and it never vested in him; that it did not vest in Abraham B. Clark until after the appointment of the plaintiff as assignee, and until the death of the widow; and that Abraham B. Clark, being indebted to his wife in a large amount of money, paid to her, on account of such indebtedness, the sum which he received as the legacy, and she deposited it, as her own money, with the savings bank, and it was mingled with other moneys deposited there by her.

The answer of the savings bank admits that Isabella Clark has on deposit with the bank a larger sum of money than that paid to Abraham B. Clark by Gillespie, and leaves the plaintiff to prove his case.

It is urged, for the defendants, that, under the will, the legacy did not vest in Abraham B. Clark until the death of the widow of the testator, in April, 1872; that,

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under the will, the whole property was converted into personal estate, for all purposes; that no specific legacy was absolutely given to Abraham B. Clark with merely a postponement of the time of payment, till the death of the widow, so as to vest the legacy in him on the death of the testator; that, as the proceeds in the hands of Gillespie were not to be divided until the death of the widow, the share of Abraham B. Clark did not vest in him until the death of the widow; that no portion of the estate was set apart for Abraham B. Clark, payable in the future; that, until the death of the widow, it could not be determined who were entitled to the legacies; and that Abraham B. Clark could not have assigned or disposed of the legacy before the death of the widow, so as, as against his issue, to have vested a title to the legacy in the transferee, if he himself should not survive the widow.

It is impossible to distinguish this case from that of *Lawrence v. Bayard* (7 *Paige*, 70). There, on the death of Margaret Leake, one-fourth of the proceeds of some bank stock was to be paid to the then surviving oldest son of William Bayard the elder. He had two sons, William and Robert, of whom William was the elder, and both of whom survived Margaret Leake. Before the death of Margaret Leake, William, in 1832, sold and assigned to one Hall his contingent interest in the proceeds of the bank stock to which he would be entitled as the eldest son, if he should survive Margaret Leake. Hall claimed, under the assignment, as against creditors of William, who, after the death of Margaret Leake, took proceedings to reach the interest of William in the property. It was contended, for the creditors, that the interest of William was a naked possibility, which could not pass by assignment. The Chancellor says: "There is no foundation for the objection that the interest of W. Bayard was of such a nature that it could not pass by sale or assignment before the death of

Mrs. Leake. It was not a mere naked possibility coupled with an interest; but it was a vested remainder in one-fourth of the six hundred shares of the bank stock, according to the statutory definition of vested remainders, for W. Bayard was the person in being and ascertained, who would, at the time of the assignment, in 1832, have had an immediate right to the possession of such bank stock, if the life estate of Mrs. Leake therein had then ceased (see 1 *R. S.* 723, § 13). He was the oldest son, to whom this remainder in fee was limited, subject only to be divested by his death during the continuance of the particular estate or interest of Mrs. Leake, and in the lifetime of his brother Robert. The limitation of the remainder in fee to W. Bayard was, therefore, vested in interest. But I admit the substituted remainder to Robert necessarily remained contingent so long as his elder brother was living. Nothing could defeat W. Bayard's right to the bank stock or its proceeds, as an interest in possession, if he continued to live until the life interest of Mrs. Leake terminated. And it is the present capacity of the individual to take the remainder in possession, if the particular estate should immediately determine, which vests his remainder in interest; and not the absolute certainty that such remainder will ever in fact become vested in possession in him (per Nelson, C. J., 16 *Wend. Rep.* 137; *Watk. Law of Conv.* 123, 8th Lond. ed.; 5 *Paige's Rep.* 466). And nobody ever doubted that a remainder which was vested in interest could be transferred, both at law and in equity. Again, the Revised Statutes, which were in operation when this sale was made, have declared, in express terms, that expectant estates are devisable, descendible and alienable, in the same manner as estates in possession (1 *R. S.* 725, § 35). And, by an examination of the several provisions of the Revised Statutes, it will be seen, that, by the term 'expectant estates,' the Legislature intended to include every

present right or interest, either vested or contingent, which may, by possibility, vest in possession at a future day. The mooted question, whether a mere possibility coupled with an interest is capable of being conveyed or assigned at law, is, therefore, forever put at rest in this State." In the present case, Abraham B. Clark was the person in being, and ascertained, who would, at the time of the commencement of the proceedings in bankruptcy, to which time the plaintiff's title, by assignment, relates back, have had an immediate right to the possession of the legacy, if the life estate of the widow had then ceased. The remainder in fee was limited to him, subject only to be divested by his death during the life of the widow. The limitation of the remainder in fee to him was, therefore, vested in interest. Nothing could defeat his right to the legacy, as an interest in possession, if he continued to live until the life interest of the widow terminated. He had, at the commencement of the proceedings in bankruptcy, a then present capacity to take the remainder in possession, if the particular estate should immediately determine. It is of no moment that he might have died before the widow died. If he had so died, the remainder in fee would have been divested. But it was vested in interest in him at the commencement of the proceedings in bankruptcy, and it was then transferable by assignment. Moreover, his interest, under the will, to the legacy, was an expectant estate, because it was a present right or interest, either vested or contingent, which might, by possibility, vest in possession at a future day.

That the right to the legacy passed to the plaintiff, as assignee in bankruptcy of Abraham B. Clark, under section 14 of the Act, there can be no doubt. It was a part of the property and estate of the bankrupt. Moreover, it was, at least, a right in equity.

The title of the plaintiff to the legacy vested at the commencement of the proceedings in bankruptcy, and

certainly was vested by the making of the assignment on the 22d of January, 1870. The question is one of title; and it makes no difference whether Gillespie had or had not notice of the bankruptcy of Abraham B. Clark, and of the assignment to the plaintiff, when he gave the check to Abraham B. Clark. The money which Gillespie caused to be paid on the order of Abraham B. Clark, indorsed on the check, was the money of the plaintiff; and, even if Gillespie dealt with Abraham B. Clark in good faith, and without notice of the bankruptcy proceedings, still he is not protected, as against the plaintiff (*Mays v. The Manufrs. Natl. Bank*, 4 *Natl. Bkcy. Repr.* 147; *Miller v. O'Brien*, 9 *Blatchf. C. C. R.* 270).

But, the evidence in the case is sufficient to charge Gillespie with notice of the plaintiff's title. Gillespie testifies that he delivered the check to his counsel, Mr. Crosby, with the instruction to him to notify Abraham B. Clark to call on him and obtain the check. Mr. Crosby's clerk testifies that Abraham B. Clark came to Mr. Crosby's office, in the absence of Mr. Crosby, and that he, the clerk, under Mr. Crosby's instructions, gave the check to Abraham B. Clark. Mr. Crosby is shown to have known, in June, 1871, of the bankruptcy of Abraham B. Clark, and of the fact that the plaintiff was his assignee in bankruptcy, and to have been, at that time, a creditor of Abraham B. Clark, and of his former partner, Bininger, and to have at that time made claim, to the plaintiff's attorney, to a lien for his debt on property which the plaintiff, as assignee, was about to sell at auction, and to have attended, early in the summer of 1871, at the sale (at which the plaintiff, as assignee in bankruptcy of Clark and Bininger, was announced as the seller), and there given notice publicly of his claim, and to have been examined, before May, 1872, and after such sale, as a witness on the part of the plaintiff, in a suit brought by the plaintiff, as assignee in bankruptcy of

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Clark and Bininger. There is no evidence to show that Mr. Crosby did not, at the time the check was delivered to Abraham B. Clark, have knowledge of the fact that Abraham B. Clark was an adjudged bankrupt, and that the plaintiff was his assignee in bankruptcy; or to show that the knowledge which he had in June, 1871, and afterwards, was not retained by him until and at the times the check was delivered to Abraham B. Clark and the money was drawn on it, and was not then present to his mind in fact, although he did not happen to recur to it. It was knowledge which he was at liberty to communicate to Gillespie. To suppose that he did recur to it, and yet did not communicate it, would imply fraud. No suggestion of that kind can be or is made. Yet the fact, which must be assumed, that he did not recur to the knowledge, is no evidence, in view of the short lapse of time, that the knowledge was not retained by him and was not present to his mind, in the sense of the rule laid down in the case of *The Distilled Spirits* (11 *Wallace*, 356). Mr. Crosby gives no testimony on the subject. On the facts of this case, and under the decision in the case cited, I think that Gillespie was bound by the knowledge possessed by Mr. Crosby.

No attempt has been made to prove the indebtedness set up, of Abraham B. Clark to his wife; and, so far as respects the \$3,249 27, acknowledged by the Citizens' Bank to have been received by it on the 17th of May, 1872, it must be regarded as the specific money which went out of the funds of Gillespie, as executor, and as standing in the same position as if it were still in the hands of Abraham B. Clark. As against the plaintiff, it was fraudulently obtained by Abraham B. Clark from Gillespie. No title to it has passed to the savings bank or to Isabella Clark. No person has taken it from Abraham B. Clark in the course of business, or allowed an equivalent for it; and the plaintiff has a right to fol-

low it into the hands of Abraham B. Clark and of Isabella Clark, and of the savings bank.

The plaintiff is entitled to a decree against the defendants Gillespie and Clark personally, for the \$3,249 27, with interest from the 16th of May, 1872, and to a decree that the savings bank pay to the plaintiff, in exoneration of such liability of Gillespie and Clark, *pro tanto*, the sum of \$3,249 27, with such interest thereon, from May 17th, 1872, as such bank would have allowed on such deposit to Isabella Clark, less the amount of its costs in this suit to be taxed. When this suit was brought, the bank had on deposit to the credit of Isabella Clark, not only the \$3,249 27, but \$964 77 more. Isabella Clark is liable to the plaintiff for such interest as she was entitled to receive from the bank on the money, and if the bank has paid any of it to her since the suit was brought, it has paid it with notice. The bank is entitled to charge Isabella Clark in account with the amount it shall so pay to the plaintiff, and to be protected against any claim by her hereafter for such amount, by an injunction to that effect.

The plaintiff is entitled to costs against all the defendants but the bank, and the bank must recover its costs, in the manner above mentioned.

F. N. Bangs, for the plaintiff.

J. P. Crosby, for Gillespie.

Marsh & Wallis, for Clark and wife.

J. E. Wheeler, for the bank.

In the Matter of The New Amsterdam Fire Insurance Co., an Alleged Bankrupt.

FEBRUARY, 1878.

**IN THE MATTER OF THE NEW AMSTERDAM
FIRE INSURANCE COMPANY, AN ALLEGED
BANKRUPT.**

**ACT OF BANKRUPTCY.—CORPORATION DISSOLVED BY STATE COURT.—
JURISDICTION.**

A District Court has jurisdiction to declare bankrupt a corporation which has been dissolved by a State Court, but the proceeding must be commenced within six months after the corporation has been dissolved.

A corporation was dissolved by a State Court and a receiver appointed. More than six months after, the receiver collected a claim of the corporation from a debtor by legal process:

Held, That such collection was not a taking of the property of the corporation on legal process, in the sense of the bankruptcy Act.

BLATCHFORD, J. The company, which was a New York corporation, was dissolved by an order of the Supreme Court of New York, on the 14th of December, 1871, and a receiver of all its property was at the same time appointed by that Court, in proceedings instituted by the Attorney-General of the State. The petition in bankruptcy in this matter alleges that the corporation has carried on business in this District for a period of six months next preceding the date of filing the petition. The act of bankruptcy alleged is, that the corporation, on the 17th of October, 1872, being insolvent, suffered the sum of \$205 23, being money due to the corporation from the estate of one George Schenck, a bankrupt, to be taken on legal process by said receiver, with intent thereby to give a preference to one or more of its creditors, and with intent to delay and defeat the operation of the bankruptcy Act.

The 39th section requires, that the petition shall be brought within six months after the act of bankruptcy

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shall have been committed. The latest act of bankruptcy which the corporation can have committed was committed by it on the 14th of December, 1871, by its suffering the receiver to be appointed, and its property to be taken by him on legal process. He took all of its property then, under the legal process by which he was appointed. That was more than six months before this petition was filed, this petition being filed February 19th, 1873. The receiver has not taken any of the property of the corporation, on legal process, since the 14th of December, 1871, nor has any property of the corporation been taken by any one else since that time, on legal process, in the sense of the Act. He, at that time, took, on legal process, the claim of the corporation against the estate of Schenck, in so far as such claim has ever been taken by him on legal process. His collection of that claim from the estate of Schenck, on the 17th of October, 1872, is not a taking of the property of the corporation, on legal process, in the sense of the Act. The petition should have been brought within six months after the 14th of December, 1871. While a District Court has jurisdiction to adjudge a corporation bankrupt, although the corporation has been dissolved by a State Court (*In re Independent Ins. Co.* 6 *Nat'l Bank'cy Reg.* 169 and 260; *Platt v. Archer*, 9 *Blatchf. C. C. R.* 559; *In re Merchants' Ins. Co.* 4 *Chicago Legal News*, 73), yet the proceeding must be commenced within six months after the corporation has been dissolved. It was so commenced in the three cases above cited. The views adopted by the District Court in Louisiana, in *Thornhill v. Bank of Louisiana* (3 *B. R.* 110), and by the Circuit Court for that District in the same case (5 *Nat'l B'k'cy Reg.* 367), have not been adopted in this District, and I am not prepared to adopt them, until they are approved by the Circuit Court for this District.

FEBRUARY, 1878.

THE STEAMSHIP CITY OF BRUSSELS.

NEGLIGENCE.—DEATH OF INFANT PASSENGER.

A child, which was a passenger on a steamship from Liverpool to New York, was poisoned on the passage, and died, as was alleged, in consequence of negligence on the part of the officers of the ship. The father, having been appointed administrator of the child, filed a libel against the vessel to recover damages, to which libel exceptions were filed by the claimants of the vessel :

Held, That the cause of action arose on contract, and survived to the administrator, and might be sued for *in rem*.

THIS was a libel by John Ryall, administrator, &c., of John Ryall, Jr., alleging, that, in 1871, John Ryall, Jr., who was a child of five years of age, took passage on the Steamship City of Brussels, with his mother, at Liverpool, to be carried to New York, for a good consideration, that, while on the voyage, the child was poisoned by carelessness on the part of the officers of the vessel, and died on board, and that the libellant had been appointed administrator ; and it claimed damages against the steamer. The claimants excepted to the libel.

For libellant, *Salter & Cowing*.

For claimants, *Platt, Gerard & Buckley*.

BLATCHFORD, J. I think that the libel is one for breach of contract, and that the cause of action survived to the administrator, and may be sued for *in rem*, in like manner as if the deceased had sustained an injury short of death, through the negligence of those in charge of the vessel, and in breach of the contract of carriage, and had sued *in rem* therefor (*Chamberlain v. Chandler*, 3

The Steamtug Edmund Levy.

Mason, 242; *Crapo v. Allen*, 1 *Sprague*, 184; Steamboat *New World v. King*, 16 *Howard*, 469; The *Washington*, 9 *Wallace*, 513; The *Aberfoyle*, 1 *Blatchf. C. C. R.* 360; The *Pacific*, *Id.* 569). The breach is alleged to have occurred during the running of the contract, and before the end of the voyage.

The exceptions to the libel are disallowed.

FEBRUARY, 1873.

THE STEAMTUG EDMUND LEVY.

COLLISION IN EAST RIVER.—STEAMERS MEETING AT NIGHT.

The tug *W. D. R.*, going up the East river, made the green and red lights of the tug *E. L.* about ahead. The *E. L.* was coming down the river, and, on seeing the lights of the *W. D. R.*, ported her helm. The *W. D. R.*, wanting to run in to a pier on the New York side, blew two whistles, and, without waiting for any reply, starboarded her helm. The two vessels came together, the stem of the *W. D. R.* striking the port bow of the *E. L.*, and receiving such injuries that the *W. D. R.* sank :

Held, That the *W. D. R.* was in fault, in starboarding, and was solely responsible for the collision.

BLATCHFORD, J. The steamtug *W. D. Reed* was going up the East river, after dark, on the 8th of December, 1871, and, when off about pier 5, made the green and red side lights of the steamtug *Edmund Levy*, some 300 yards off, at about pier 9, about right ahead. The *Edmund Levy* was going down the river. The vessels were therefore, meeting end on, and it was the duty of each to port. Instead of porting, the *W. D. Reed*, because she wanted to run in to a pier on the New York side, blew two blasts of her steam whistle, and,

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without waiting for any response thereto from the Edmund Levy, starboarded her wheel, and ran on, with undiminished speed, the Edmund Levy having, at the same time, ported, across the course of the Edmund Levy, so that the two vessels collided, the stem of the W. D. Reed striking the port bow of the Edmund Levy, and the W. D. Reed being damaged by the blow so that she sank. In view of the statutory regulation requiring both of these vessels to port, under the circumstances, the W. D. Reed was solely in fault, and the libel must be dismissed, with costs.

W. R. Beebe, for the libellants. .

R. D. Benedict, for the claimant.

FEBRUARY, 1873.

**WILLIAM ANDERSON, ASSIGNEE, &c. v. OSCAR
STRASSBURGER AND GEORGE F. PFEIFFER.**

**FRAUDULENT PREFERENCE.—GOODS TAKEN UNDER LEVY.—MARKET
VALUE.—SHERIFF'S SALE.**

S. & P. recovered judgment against O., on which execution was issued, and the sheriff levied on his stock of goods. The next day, O. filed a voluntary petition in bankruptcy. A. was appointed assignee in bankruptcy. An injunction was issued restraining the sheriff from selling under the levy. This injunction was afterwards modified so as to allow the sheriff to sell and hold the proceeds in place of the goods. This was done, and at the sale, A. bought in the goods for the creditors, at \$2,650. He then brought suit against S. & P. to recover the goods or their value. He testified that the creditors had the option of taking the goods at the \$2,650, but did not take them, and he took them himself; and that he thought that competent parties would appraise the goods at \$6,600.

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It appeared that S. & P., at the time of the entry of the judgment, knew O. to be a bankrupt:

Held, That A. was entitled to recover the goods or their value, and that the order modifying the injunction afforded S. & P. no defence;

That they were liable, however, only for the \$2,650 which the goods brought at the sheriff's sale.

THIS was a bill in equity filed by the plaintiff as assignee in bankruptcy of Frederick Ordemann. The bill alleged the voluntary bankruptcy of Ordemann, on petition filed on November 1st, 1871, and the appointment of the plaintiff as his assignee on February 6th, 1872. It further alleged that the defendants, on October 31st, 1871, recovered a judgment against Ordemann; that Ordemann on that day suffered his stock in trade to be taken on legal process, viz., on an execution on said judgment; and that the defendants took the property to obtain a preference, and with knowledge that Ordemann was insolvent, and intended to give them a preference in fraud of the Act. The bill prayed for a recovery of the goods or their value. In the bankruptcy proceedings, an injunction had been issued restraining the defendants from interfering with the property of Ordemann, which injunction was, on motion, modified so as to permit the sheriff to sell the goods on which he had levied, "and convert the same into money, and hold the proceeds in place and stead of the goods themselves, subject to the further order of the Court;" and they were sold accordingly. The defendants answered, denying the allegations of the bill as to fraud or preference and the insolvency of Ordemann.

For plaintiff, *T. M. North*.

For defendants, *C. Wehle*.

BLATCHFORD, J. Under the recent decisions of the Supreme Court of the United States in the case of *Buchanan v. Smith* (16 *Wallace*, 277), and of the Circuit

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Court for this District in the case of *Mayer v. Hermann* (10 *Blatchf. C. C. R.* 256), the right of plaintiff to recover, on the facts in this case, is clear.

The order made by the bankruptcy Court on the 11th of December, 1871, only modified the injunction "so as to permit the sheriff to sell" the goods levied on, and convert them into money, and hold the proceeds of sale in place of the goods, subject to the further order of the bankruptcy Court. It left the defendants at liberty to have a sale if they chose to take the risk. If they should sell, the proceeds of sale would stand in place of the goods. But the plaintiff is entitled to recover the goods or their value, at his option. He asks for their value. He does not ask for the goods, and he is not compelled to take the proceeds, which are merely a substitute for the goods, if such proceeds are not the full value.

But, on the evidence, I think the value of the goods cannot be fixed at a higher sum than the \$2,650 they brought on the sale. The plaintiff, who was not, at that time, assignee of the bankrupt, but was one of a firm who were creditors, bought in the goods at the sale for \$2,650, acting for the creditors generally. He says that other creditors for whom he acted had the privilege of taking the stock by paying the \$2,650, but they did not, and then he took it to himself at that price. Yet he fixes its value at \$6,800, by saying that that is "the price at which it would be appraised by competent parties, under partition or division, or in anticipation of a forced sale." That is his definition of "market value." Yet he says that in all the transaction his desire was "to prevent sacrifice," and to have the stock "bring near its value," and he considered he was acting by direction of the creditors, so as to get for them "the largest possible percentage on their claims." Charged as he was with this trust, the presumption is that he discharged it properly, and, therefore, that he obtained full value for the goods he bid in, when he took them at \$2,650. It cannot

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be that their fair market value was \$6,800, and yet that he could get no more than \$2,650 for them.

The plaintiff is entitled to a decree for \$2,650, with interest from the commencement of this suit, less a credit, on the 8th of March, 1872, of \$875 39, with costs of suit.

Eastern District of New York.

FEBRUARY, 1873.

IN THE MATTER OF WILLIAM HARRIS & COMPANY, BANKRUPTS.

PROCEEDINGS IN DIFFERENT DISTRICTS.

A firm was adjudged bankrupt, on petition of creditors, without opposition, the warrant was delivered to the marshal, a meeting of creditors was held, and an assignee chosen, who entered on his duties. Thereafter, one of the creditors applied to set aside all the proceedings as irregular, under the 16th General Order, because he had, previous to the filing of this petition against the bankrupts, filed a petition against them in another District:

Held, That the proceedings in this Court were regular, notwithstanding the prior filing of the other petition, and that there was no ground for setting them aside.

BENEDICT, J. This is a motion by a creditor to set aside the proceedings which have been had in this case.

It appears that certain creditors of the firm of Harris & Co. duly filed their petition in this Court, within whose jurisdiction the majority of the members of the firm reside, asking that said firm be adjudged bankrupts by this Court. Upon the return of the order to show cause, no opposition being made, the firm proceeded against was adjudged bankrupt by this Court, and a warrant duly

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issued to the marshal. Afterward, a meeting of creditors was held, at which an assignee was duly chosen, who thereafter entered upon his trust.

It is not doubted that this Court had jurisdiction to entertain the petition and make the adjudication of bankruptcy. No objection whatever is made to the assignee chosen by the creditors; and, upon their face, all the proceedings taken in this Court were regular. The attention of the Court was in no way called to the ground of the complaint made by the party here moving, until after the adjudication had been made, and the assignee chosen by the creditors had entered upon his duties.

In this position of the case, one of the creditors appears before the Court and shows that, prior to the filing of the petition in this Court, he had filed a petition in the Southern District of New York, to have the same firm which, as is alleged, did business in the Southern District, there adjudged bankrupt, to which petition an answer has been filed, and the issues so raised are there pending, undecided and untried.

Upon these facts, it is now claimed by the said creditor that all the proceedings in this Court should be set aside as irregular, because of the 16th General Order.

If this motion had been made or a stay applied for before the adjudication of bankruptcy had been made and an assignee elected, the way to relief would have been easy. And if it were now suggested, that any creditor had suffered detriment in the election of an improper assignee, prompt relief in that regard would be afforded; but, in the absence of any other fact than the mere pendency of a prior petition in another District, which is there being contested, it appears to me that it would be worse than useless to set aside these proceedings, and turn the creditors of this firm over to try the question of its bankruptcy upon another contested petition. No possible benefit to any one from such a course has been suggested on this motion.

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I should, therefore, upon the papers before me, deny the motion as needless, even if it appeared that the adjudication was irregular because a prior petition was pending in another District ; but I do not see how the proceedings here can be said to be irregular. General Order 16 does not prevent a creditor from taking an adjudication by default, because some prior proceeding, instituted by another creditor, is in another District being defended. The 42d section of the Act requires the Court, upon default, to pronounce an adjudication, and forthwith issue the warrant ; and General Order 16, while it declares that proceedings on a second petition may be stayed, also declares that the Court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same be closed.

Here an adjudication was made without any application for a stay, and without any objection by any party, and it must be considered to have been regularly made. I regret that no application for a stay was presented to me before an adjudication had been entered and the title of the assignee become fixed, as then all possibility of confusion could have been avoided ; but in the present state of the case, after an adjudication made, no ground for setting aside the proceedings is afforded.

The motion must, therefore, be denied, for the reason above stated, without considering the effect of the conceded fact that the petition filed by the party here moving cannot be heard in the Southern District, because of the pendency there of a petition still prior to his, also unheard.

The motion is accordingly denied. •

In the Matter of the Petition of the Owner of the Steam Propeller Epsilon.

FEBRUARY, 1873.

**IN THE MATTER OF THE PETITION OF THE
OWNER OF THE STEAM PROPELLER EP-
SILON.****LIMITATION OF LIABILITY.—INJURIES TO PERSON.—JURISDICTION OF
THE ADMIRALTY.—MODES OF PROCEDURE.**

The Act of March 3d, 1851 (9 *U. S. Stat. at Large*, 635), limits the liability of the owner of a ship for injuries to persons, as it limits such liability for injuries to property.

Notwithstanding the language of the 4th section of the Act, it can be carried into effect by a Court of Admiralty.

In case the fund provided for by the Act is insufficient to satisfy the demands against it, the claimants on the fund must share *pro rata*.

The Admiralty creates its own forms of proceeding.

Where the Supreme Court has not by its rules provided for modes of proceeding, the District Courts have the power and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer.

BENEDICT, J. This is a cause of limitation of liability promoted by the owner of the steamer Epsilon. The material facts stated in the libel are as follows :

On the 27th day of May, 1872, while the steamer Epsilon was engaged in her ordinary and maritime occupation in that arm of the sea known as the East river, within the Admiralty and maritime jurisdiction of the United States, her boiler exploded, and she was thereby caused to sink immediately.

This accident, the owner insists, was not caused by any negligence or fault on his part, and was without his privity or knowledge, notwithstanding which certain persons who were then on board said vessel have made claims against him for payment of damages sustained by them by reason of said explosion. Some of these claims

In the Matter of the Petition of the Owner of the Steam Propeller Epsilon.

arise out of personal injuries sustained by persons on board the vessel. Other claims arise out of the destruction of property belonging to the master and crew; others still arise out of the deaths of persons on board, caused by the said explosion; and there is one claim arising out of the death of a person who, while on pier 20, and in no way connected with said vessel, is said to have been so injured by a part of the said steamer thrown by the explosion, that he died, whereupon one Sarah Parsons, the legal representative of said deceased person, has sued the said owner in the Supreme Court of the State of New York, and within this District, to recover \$5,000 damages, by reason of said death. No freight was at the time pending, and the said steamer was so injured, that, although thereafter raised by her owner, her value as she now lies within this District, is alleged to be less than the sum of money expended by her owner in raising her.

Under these circumstances, the owner of the steamer has presented his cause of limitation of liability to this Court, and prays that this Court would direct an appraisal of the value of his interest in said vessel and her freight, to the end that he may pay the same into the registry of this Court, or secure the same to be so paid when directed, and that a monition may issue against all persons claiming any damages of any kind, by reason of the said explosion, citing them to appear before this Court, and make due proof of their respective demands, and that this Court would declare the limit of the owner's liability, by reason of said accident, and would, upon the payment of said amount into the registry of the Court, declare the said owner exempt from further liability, and that this Court would distribute among the parties proved entitled thereto any amount so paid into this Court, and restrain all persons, including the said Sarah Parsons, from further prosecuting any suit against the said owner to recover damages aris-

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ing out of said accident. Upon the filing of this libel, notice of the time of application for the appraisement prayed for was directed to be given by publication; it appearing necessary, to avoid injustice, that the value of the owner's interest should not be appraised without notice to the creditors. Upon the return day of the notice, Sarah Parsons appeared by her attorney for the purpose of objecting to the jurisdiction of the Court, and several questions have been presented which I am asked to pass upon in this stage of the case, to avoid expense, delay and confusion.

And first, my attention has been directed to the fact that the libellants ask relief against an adjudication of demands not maritime in character, and therefore not cognizable by this Court. Second, that the libel does not show the pendency of any suit *in rem* or *in personam* in the Admiralty, to recover any of the demands against which protection is sought in this Court. Third, that it does not appear by the libel that this Court has, or will ever have, any fund in its custody on which to base its jurisdiction in the premises. And, lastly, that none of the demands against which protection is sought by virtue of the Act of March 3d, 1851, are within the scope of that Act.

In considering these features of this case, I remark first, as I have had occasion before to say in considering the petition of the owners of the City of Norwich for a limitation of their liability (*ante*, p. 124), that the jurisdiction of the Admiralty over such a cause was maintained by the Supreme Court in the case of *Norwich Co. v. Wright* (13 *Wal.* 104), not because of the maritime character of the demands of the creditors, but by reason of the nature of the relief to the owners of a ship which the Act of 1851 affords. If I have correctly estimated the effect of the action of the Supreme Court in regard to this subject, the character of the demands of the creditors is immaterial. But if the rule were otherwise,

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it would not prove fatal to this cause, inasmuch as many of the demands set forth in the libel are cognizable in the Admiralty, the injuries having been done upon the navigable waters of the United States, and some of the persons injured having been at the time engaged in the service of the vessel. (*The Plymouth*, 3 *Wal.* 20. See also, in this connection, the cases of *The Beta*, 20 *L. T. R.* 988; *The Sylph*, 11 *L. T. R.* 521; *The Guldflaye*—an action in the Admiralty, by representatives, to recover damages for the death—19 *L. T. R.* 748; *Crap v. Allen*, 1 *Sprague*, 184; *Cutting v. Seabury*, 1 *Sprague*, 522; *The Admiralty Law of Collision*, 158; *The Sea Gull*, Chase, J., 2 *Am. L. T. Reps.* 15.) Others of the demands described in the libel, certainly that one of them arising out of the death of the person who was standing upon the pier, are not cognizable in the Admiralty (*The Plymouth*, 3 *Wal.* 20), but the presence of such demands cannot oust the jurisdiction of the Admiralty to entertain this proceeding.

In a cause of this character the adjudication of any one demand involves an adjudication of all other demands made and arising out of the same disaster; and from the necessity of the case, therefore, the whole mass of demands may be brought within the cognizance of the Admiralty by the institution there of a cause of limitation of liability promoted by the ship's owner. Neither is it fatal to this cause that no suit *in rem* or *in personam* has been brought in this Court to enforce any of the demands in question. Nor is it requisite that it should appear on the face of the libel that some amount of money is to be distributed in this cause. Objections similar to these have been considered by me in the case of the owners of the *City of Norwich*, above referred to, and my views in respect to them will be found there stated.

There is, however, in this case, another question of much importance, and that is, whether the Act of 1851

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has any effect to limit the liability of the ship owner for personal injuries which have been caused, without privity or knowledge of the owner, in the course of and by reason of the use of his vessel in her natural and lawful employment. This question is by no means free from difficulty, but the opinion I have arrived at is, that the Act of 1851 limits the liability of the ship owner as well for injury done to the person as for those done to property. This conclusion appears to be compelled by the language of the third section of the Act. In that section the words used are, first, "for property, goods or merchandise;" next, "for any loss, damage or injury," and then "for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred." These words include all kinds of injuries, for which the ship owner may become liable in the use of his vessel, and cover injuries to the person as fully as they do injury to property. Furthermore, section six of the Act indicates that the intention was to cover injuries other than those to property. The implication of that section is, that the preceding sections cover not only damages arising from injury to property, but in addition thereto "demands on account of any negligence of the master or crew." The Supreme Court have been unable to consider the effect of the third section to be limited to the goods on board the owner's ship, and it is to my mind still more difficult to find anything in the section which can be said to restrict its effect to demands arising out of injury to property alone. If, as has been suggested by the Supreme Court, the intention of the Act of 1851 was by statute to establish in this country the rule of the general maritime law in respect to the liability of the owners of ships, it must follow that the Act be held to cover demands for injuries to persons as well as to property.

I am not unmindful that it may be urged that the rule of liability imposed upon the owners of ships by the maritime law is founded upon public policy, and that,

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when it is to be applied to modern navigation, the limitation of that liability must be restricted to injury to property, because otherwise the tendency of the rule would be to deprive the public of such protection against accidents as a fear of an unlimited liability for injuries to persons on board vessels will naturally compel ship owners to afford. But this consideration has force only in regard to a certain class of persons, and fails to furnish ground for a construction which, if it places any, must place all personal injuries beyond the scope of the Act. Considerations of a very similar character have furnished the ground for all the opposition which has been made to the rule of limited liability, and they have, in most countries, been overpowered by the strong public interest to encourage the investment of capital in ships. It is, of course, highly important to protect the persons of those who are carried in ships, but, in order that there may be any persons carried, there must be ships to carry them. The Act of 1851 does not apply to river or inland navigation, but is confined to a commerce where the amount of property and number of persons transported on each voyage is upon the increase, while the hazard of the navigation does not diminish. In a late collision off Dungeness, some hundreds of persons were destroyed or injured. The investment of capital in such a commerce might well be deterred by a refusal to give the benefit of the Act of 1851 in respect to demands for injury to the person. The necessary protection of life against neglect may perhaps be better secured by criminal punishments inflicted on those guilty of the neglect than by increasing the risks of capital invested in navigation.

There is also a reason for the rule of limited liability, founded in justice to the ship owner, which is applicable alike to demands arising out of injuries to persons and to property. It is, that the master and crew of a ship are agents forced upon the ship-owner

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by the necessities of navigation, to whom he is compelled to intrust his ship—an instrument of great power for good and for ill, but whose actions he cannot, in the nature of things, superintend or control; and for whose acts either of omission or commission, therefore, he should not be responsible beyond the value of the property which he has been willing to commit to their control (*Boulay Paty*, Tome 1, p. 269; *Bedarride Com. du Code de Commerce*, Liv. 2, *Traité* 1, section 298). We may also look at the law of the two great maritime nations, England and France, as well calculated to throw light upon this question, for “uniformity is almost the essence of the maritime law” (*Pardessus*). Nothing appears in the law of these countries which leads to the conclusion that any such restricted operation should be given to our Act of 1851. In England, where—and the fact is characteristic of the nation—it was not until 1734 that any recognition whatever was made in courts of common law of what had been a marked feature of the law of other nations for centuries, the limited liability Acts have been constantly extended, and, although still partial in their operation, they cover demands arising out of injuries to persons as well as to property; which limitation, it may be noted in passing, is there effected in the Admiralty, although the demand be that of a representative of a person deceased, under Lord Campbell’s Act. The English Act has restricted operation, because the vessel is assumed by statute to be of a value of £8 per ton, where there is no loss of life, and of a value of £15 per ton where both kinds of injury happen, a feature open to the criticism that while the liability of a wealthy ship owner of a large ship cannot exceed the value of the property he puts at risk, the poor owner of a less valuable vessel may be held liable for an amount far exceeding the value of the property which he has put at risk. (See *Papers on Maritime Law by Wendt*, p. 130.) But our Act of 1851 was manifestly intended to have a

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more enlarged effect than any English statute, and finds its true interpretation in the maritime law of the continent. If we turn then to France, where the rule of maritime law now under consideration has been administered for so long a period, no tendency to restrict the rule can be detected, but the contrary appears. There the Ordinance of 1681 made an election between the more extended liability which existed under the laws of the Romans, a nation which had little commerce, and that more liberal rule adopted by the commercial nations of the Mediterranean, and embodied in the *Consolato*. The latter was chosen and incorporated in the Ordinance. After the passage of the Ordinance, in opposition to the opinion of Valin, with whom the Roman law had great influence, and in accordance with the opinion of Emerigon (*Contr. a la grosse*, ch. 14, section 11), the rule was understood to enable the ship owner, by a surrender of his ship and freight, to free himself from all liability of every kind, as well that arising from the contracts as from the faults and torts of the master. The *Code de Commerce* was long understood as having simply restated, in section 216, the rule as practiced under the Ordinance. And when, in later years the Court of Cassation evinced a determination to give to that section a restricted effect, and to exclude from it all demands arising on contract, immediate resort was had to the legislative power, and by general request, in 1841, the phraseology of section 216 was so changed as to make the restriction attempted by the Court impossible to be maintained.

The text writers on maritime law whose works I have been able to consult, do not appear to allude in terms to the effect of the Ordinance or the *Code de Commerce* upon demands arising out of personal injuries, but the language everywhere used is broad enough to cover such demands. "The abandonment of the ship and freight puts an end to every kind of responsibility on the part of the owner" (*Caumont, Dict. Mar. Law*, p.

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24, *traité Abandon*, § 13). That the rule of the maritime law is there so understood, appears from a case before the Court of Cassation in January, 1860, involving claims by passengers, where it was declared that "even where the ship is totally lost, and although the passenger has not made a special commercial contract, (*acte de commerce*), upon taking passage on a steamboat, no provision of law prevents the application of the rule of limited liability declared in section 216 of the Code, otherwise the special responsibility resulting in favor of passengers would be more onerous even than that resulting from a shipment of merchandise. Such an exception would be in fact contrary to the spirit as to the words of the law" (*Caumont, Dict. Mar. Law, traité Abandon*, § 83). The law upon this subject in Italy, Portugal, Holland, Denmark, Sweden and Russia is said to agree with that of France.

Looking therefore at the words of section third of the Act, in the light thus thrown, it appears to me that the full effect can be given to the section which its language imports, and that it should not be considered as confined to demands arising out of injuries to property alone.

But, it is said, this construction cannot be given to the third section of the Act, because no terms used in the fourth section can be construed to include demands other than those arising from injuries to property, and the fourth section must therefore be held to engraft a restriction upon the third section. But no such result necessarily arises from the absence in the fourth section of any provision respecting claims for injuries to the person. The manifest object of section four was to indicate methods to which resort might be had to carry the third section into effect. It specifies some cases, not necessarily all, where relief may be sought under the Act, and it specifies some, but by no means all, the machinery to be used to give the

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relief. It contains, however; no language which appears to be intended to convey the idea that no other cases than those specified in the section could arise under the Act. Even the meagre provisions which the section does contain, seem unnecessary, and in my opinion, the whole section could be stricken from the Act, without in the slightest degree impairing its efficiency. Possibly the clause providing for a transfer of the ship to a trustee may be important to the working, as it certainly is to the understanding, of section three; but even that clause cannot be given effect except under the order of a Court, and the language there used is sufficiently broad to enable all classes of demands to receive the benefit of it. The same result could probably be reached by a Court of Admiralty, without the clause. Results very similar are effected in the course of ordinary Admiralty proceedings without any statutory provisions.

The other provisions of section four seem clearly superfluous. One of these is a declaration that where there are various demands for damages to property which exceed the amount of the owner's liability, as limited by the third section, they must share the amount proportionately. But section three contains by necessary inference the same declaration. When that section made all the demands payable out of a certain amount, it declared in effect, that in case of deficiency the demands must share *pro rata*. Another provision of section four is the declaration, that owners of ships may take appropriate proceedings in Court for the purpose of apportioning the sum for which they may be liable among the parties entitled thereto. But it is not said where such proceedings are to be taken, nor when, nor what they shall be; and I take it no special statute was necessary to give to ship owners the general right to take appropriate proceedings in Court to obtain relief given them by law. Furthermore, the only proceedings spoken of are those to be taken for the purpose of apportioning the,

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sum for which the owners may be liable; but other proceedings may be taken, for instance, to free the vessel by a stipulation. The remaining provision of the fourth section, which confers on freighters and owners of property the right to institute a proceeding apparently intended for the benefit of the ship owner alone, may be the sole foundation for so peculiar a right, and it may well be that the limitation of this provision to demands for injuries to property, excludes holders of demands for injuries to the person from exercising such a right.

In most countries, proceedings to limit the liability of the owner are never taken by a creditor of any kind, because they are proceedings for the benefit of the owner alone; and I imagine that here freighters will seldom avail themselves of the right to take such proceedings, which the fourth section of our Act confers. But surely the granting of such a right to owners of property does not warrant the conclusion that there are no other descriptions of demand, against which the ship owner may be protected, when all kinds of demands are covered by the plain words used in that portion of the act framed expressly to declare the limit of his liability.

It seems, therefore, that the provisions of the fourth section should not be held to engraft any restriction upon the language of the third section, unless it be found that the third section is incapable of being carried into effect except by means of methods and proceedings provided in the fourth section. It cannot be so found, if it be held that the Admiralty has jurisdiction to enforce the section, by reason of the subject-matter.

When this Act was first presented to my consideration, upon the application made in regard to the City of Norwich (1 *Benedict*, p. 97), although I denied the application upon a ground which appears to be sustained by the decision of the Supreme Court in *Wright's case*, namely, that a proceeding to obtain the benefit of the Act must be a proceeding independent of an action in

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rem, I expressed the opinion that a Court of Admiralty could not entertain jurisdiction of a cause of limitation of liability, no matter how brought. But now, better instructed by the Supreme Court, and bound to hold that such a cause is within the jurisdiction of the Admiralty by reason of the subject, I can add, without hesitation, that the owners of a ship can, without difficulty, obtain at the hands of that Court all the relief intended by the Act, and without any resort to or violation of any provision in the fourth section contained.

For the Admiralty creates its own forms of proceeding, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the Admiralty. "The principles, rules and usages which belong to Courts of Admiralty" (Process Act 1792) enable these Courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other Courts, and for many of which it were vain to look in any statute. Stripped of the power to pursue these methods, there would be little left to distinguish a Court of Admiralty from a Court of equity or of law. So the Admiralty and maritime jurisdiction of the United States has been described as "embracing a *system of procedure* known and established for ages" (The Magnolia, 20 How. 303). Therefore is it said that "a maritime lien arises from the jurisdiction, not the jurisdiction from the lien" (Smith v. Brown, 1 Asp. M. L. C. p. 59).

For the sake of maintaining uniformity, the Supreme Court of the United States, which is the highest Court of Admiralty, has been given power to prescribe and regulate the forms and modes of proceeding to be followed by all the District Courts in the exercise of their Admiralty jurisdiction; but when cases arise which have not been provided for in the rules prescribed by the Supreme Court, the District Courts, as the only Courts of

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original jurisdiction in Admiralty, have the power and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer. "The reason of the thing and usage" afford a sure ground for procedure in Courts of Admiralty (*The Orpheus*, 3 *M. L. C.* 532). Thus guided, it has been possible for the maritime Courts of the continent to administer a rule of limited liability similar to that stated in the third section of the Act of 1851, without the aid of any special statutory modes of proceeding. No modes of proceeding appear to have been attached to the rule when placed in the Ordinance, and none appear in the Code de Commerce. In England, where the execution of the law was at first intrusted to the Courts of equity, statutory modes of proceeding were provided for these Courts, some of which appear in the fourth section of our Act. But here, where the jurisdiction is given to the Admiralty by reason of the subject-matter, the Courts of Admiralty are certainly as well able as any Courts of Admiralty to exercise it effectually; and other maritime Courts, say the Supreme Court, "have found no difficulty in carrying the law into execution." In fact, one of the reasons given by the Supreme Court for holding the subject-matter in question to be within the jurisdiction of the Admiralty Courts, is because the modes of procedure belonging to those Courts are so well adapted to carrying the law into execution. And the Supreme Court have, by the new Rules, prescribed methods to be pursued by the District Courts in carrying the law into effect, which are not to be found in section 4 of the Act of 1851, thus not only showing the ability of these Courts to contrive methods whereby to carry the law into execution, but also showing that, in the opinion of that Court, no restriction of the Act arises from the provisions of the fourth section, at least in respect to methods of procedure. For these reasons, therefore, I conclude that the legal effect of the Act of 1851 is to

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limit the liability of the owner of a ship for injuries to persons as it does for injuries to property, and that notwithstanding the phraseology of the fourth section of the Act, the statute so understood can be carried into execution by a Court of Admiralty, and that upon the facts set forth in this libel, it is the duty of the Court to entertain the present proceeding and grant such relief therein as the proofs may show the libellant to be entitled to. In announcing this determination, I feel at liberty to say that I realize the importance of the main question here involved, and appreciate that the solution I have endeavored to give may have the appearance of extending the Act of 1851 beyond any limit in the mind of the Supreme Court, when the decision of that Court in the case of Wright was made. But I give to the action of the Supreme Court in respect to this subject full scope and effect in this case with less solicitude, because, by entertaining the present libel, I furnish the parties in interest an opportunity, by means of an application for a writ of prohibition, to bring the subject before the Supreme Court with little delay or expense; and if I have made a mistake, I can thus at once be set right, and much litigation saved, not only to these parties, but to other parties similarly situated.

An order will, therefore, be made, directing that an appraisement be had of the value of the libellant's interest in the said steamer Epsilon and her freight, to the end that a monition be issued against all persons claiming damages by reason of the accident in the said libel mentioned, citing them to appear and make due proof of their respective claims, and meanwhile that, until the further order of this Court, the said Sarah Parsons be restrained from prosecuting her above mentioned suit against the libellant.

Southern District of New York.

MARCH, 1878.

THE UNITED STATES *ex rel.* LEONARD O. HYDE,
ASSIGNEE, &C. *v.* EDWARD W. BANCROFT
AND MICHAEL STEINER.*

VIOLATION OF INJUNCTION.—DAMAGES.

In a bankruptcy proceeding, an injunction was issued, on a special petition of the petitioning creditors, enjoining a firm, of which B. was a member, and a firm, of which S. was a member, from prosecuting suits commenced by such firms respectively against the bankrupts, in Illinois, in each of which suits attachments had been issued, under which property of the bankrupts had been attached. The injunction was personally served on B. and on S. After such service, the proceedings under the attachments were continued to judgment, and the property was sold under execution. Proceedings were taken to punish both B. and S. for contempt in violating the injunction. S. set up, in defence, that the proceedings had been carried on by assignees of his firm, the assignment being made by a member of his firm then in Illinois, and who was not served with the injunction. B. set up that the further proceedings in his suit had been conducted by assignees of his firm, the assignment having been made by one D., a clerk of B.'s firm:

Held, That it was competent for this Court to restrain these attaching creditors from further proceeding against the property which they had attached as the property of the bankrupts;

That both B. and S. had violated the injunction of the Court by the further proceedings in the attachment suits;

That each of them, to purge his contempt, must show that he endeavored to stop the suit of his firm in Illinois, or that the claim had been, in fact, assigned before the injunction was served, neither of which things had been shown;

That a fine to the amount of the value of the attached property, with interest, and the expenses of the contempt proceedings, including a proper counsel fee, must be imposed on each of them.

BLATCHFORD, J. The violations of the injunction by both of the respondents are satisfactorily proved. The injunction of the 3d of April, 1869, which was served on

* The Circuit Court affirmed this decision, on review.

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each of them, restrained their respective firms from further proceedings in the actions brought in Illinois by their respective firms against the bankrupts, and wherein the property assigned by the bankrupts to Kaufman had been attached, so far as regarded proceedings against such property. This injunction was issued after the adjudication in bankruptcy, and it was entirely competent for the Court to restrain these attaching creditors from further proceeding against the attached property, which, by attaching it, they recognized as the property of the bankrupts, and which, by reason of the adjudication, this Court had the authority to control. The creditors' petition for adjudication was filed on the 18th of March, 1869. The order of adjudication was entered on the 27th of March, 1869. The attachments were levied in January and February, 1869. They were, therefore, dissolved by the bankruptcy proceedings. Having authority, by virtue of the adjudication, to issue a warrant to its messenger, to take possession of all the estate of the bankrupts, and, among other property, of the property so attached as the property of the bankrupts, and to which the firms of the respondents made no claim except by virtue of the dissolved attachments, this Court necessarily had the incidental and ancillary authority to enjoin these respondents and their firms from further proceeding against the attached property in the suits such firms had brought. The authority is derivable from the power given by the first section of the bankruptcy Act, to collect and dispose of the assets, as well as from the power given to the Court by the judiciary Act to issue all writs necessary for the exercise of its jurisdiction. This injunction was issued on a special petition to that effect, presented by the petitioning creditors after adjudication, and before the appointment of an assignee; and the Court, having jurisdiction of the *res*, had authority to issue an injunction to restrain interference with such *res*.

The records of the Court in Illinois show violations of this injunction by both of the parties. The record shows, that, on the 8th of June, 1869, Steiner's firm, by its attorneys, the same who had brought the suit and issued the attachment, entered a judgment in the suit against the bankrupts by default, after publication of notice, and caused a writ of inquiry to be issued and executed; that, on the 9th of June, 1869, a judgment was entered in the suit, that Steiner's firm recover of the attached property \$3,416 35, and costs, and that a special execution issue to the sheriff for the sale of the attached property; that, on the 25th of June, 1869, by direction of the plaintiffs' attorneys, an execution was issued, which recited the issuing and levying of the attachment on property specified in the execution, and the entry of the judgment against the property, and the order of sale, and directed the sheriff to make the amount of the judgment and costs, \$3,445 85, out of such property; that the sheriff sold the attached property for \$1,548 05; and that, on the 21st of July, 1869, the said attorneys received from the sheriff thereon \$1,451 28 "for assignees of plaintiffs' claim," as expressed in the receipt, the receipt being signed by them as "attorneys for assignees." Prior to the date of this receipt, the record makes no mention of any assignment, and such attorneys, prior to such date, appear as the attorneys for Steiner's firm, as plaintiffs.

This record makes out a case against Steiner of a violation of the injunction. It is suggested, that, before the injunction was served, Steiner had heard that the claim had been assigned by his firm, acting through his partner, in Illinois. If the claim was, in good faith, and in fact, assigned before the injunction was served, Steiner might, perhaps, not be responsible for the use of his name, by the assignee, to continue the prosecution of the suit. But not a particle of legal evidence is produced to show that any such assignment was ever made.

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The assignment is said to have been made by the partner in Illinois, to one of the plaintiffs' attorneys. But neither of those persons is produced to testify. The injunction, on its face, advised Steiner of the suit, and where it was brought, and by whom, and against whom, and what property had been attached in it. In violation of the injunction, Steiner's firm continued the proceedings against the property, and caused it to be sold, so that the assignee in bankruptcy was deprived of it. The proceedings in the suit were not resumed until two months after the service of the injunction. The only excuse Steiner gives is, that, having heard, before the injunction was served on him, that the claim had been assigned, he thought that he had no further interest in it. He handed the injunction to his lawyer, but did not advise his partner in Illinois of its service. It is not shown that he asked, or received, any advice from his lawyer in the premises. It was his duty, as a member of his firm, to have stopped the proceedings in the suit. On the facts of the case, he is as much responsible for their continuance, and for violating the injunction, as if he had personally directed that they should be continued, notwithstanding the service of the injunction. If this were not so, injunctions served on plaintiffs in suits, to restrain their prosecution, could easily be violated with impunity, by simple abstinence on the part of the plaintiffs from communicating knowledge of the injunctions to the attorneys prosecuting the suits. In the present case, Steiner, to purge his contempt, must show that he endeavored to stop the suit, or that the claim had, in fact, been assigned before the injunction was served. Neither of these things is shown.

The record of the Court in Illinois shows, that, on the 8th of June, 1869, Bancroft's firm, by its attorney, the same who had brought the suit and issued the attachment, entered a judgment in the suit against the bankrupts, by default, after publication of notice, and caused a writ of

inquiry to be issued and executed ; that, on the 9th of June, 1869, a judgment was entered in the suit, that Bancroft's firm recover, of the attached property, \$1,051 95, and costs, and that a special execution issue to the sheriff for the sale of the attached property ; that, on the 28th of June, 1869, by direction of the plaintiffs' attorney, an execution was issued, which recited the issuing and levying of the attachment on property specified in the execution, and the entry of the judgment against the property, and the order of sale, and directed the sheriff to make the amount of the judgment and costs, \$1,080 50, out of such property ; that the sheriff sold the attached property for \$1,051 95 ; and that, on the 21st of July, 1869, a person named Green, the same who was one of the plaintiffs' attorneys in the Steiner suit, and is said to have been the assignee of the Steiner claim, received from the sheriff thereon \$962 20, under an order from the attorney for the plaintiffs, which directed the sheriff to pay such money to Green, "taking his receipt for me, as attorney for W. M. Ross, assignee," such receipt being given by Green, and being signed in the name of such attorney, as "attorney for W. M. Ross, assignee, by N. W. Green." Prior to the date of this receipt, the record makes no mention of any assignment, and such attorney, prior to such date, appears as the attorney for Bancroft's firm, as plaintiffs.

It appears, that, on the 26th of May, 1869, one Dunn, a clerk in Bancroft's firm, acting for it, assigned the claim to Ross, and notified the plaintiffs' attorney in the suit that he would thereafter receive his instructions from Ross. The injunction, on its face, advised Bancroft of the suit, and where it was brought, and by whom, and against whom, and what property had been attached in it. Bancroft's only excuse is, that he had, before the service of the injunction, put the matter of the collection of the claim into the charge of Dunn ; and that, when the injunction was served, he sent it to the depart-

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ment in which Dunn was employed, "intending and supposing that it would be obeyed." He does not appear to have given any instructions to stop the suit. On the 14th of August, 1869, and not before, his firm received from Ross \$885, and entered it on their books, and balanced and closed their account against the bankrupts. A more gross violation of an injunction than this cannot well be conceived. The party receives the injunction, gives no direction to stop the proceedings, permits the claim to be assigned, permits the attorney to be notified to receive instructions from the assignee, permits the suit to proceed and the property to be sold, permits the assignee to receive the proceeds, and, after that, permits the assignee to pay over a sum which is received in full satisfaction of the original claim, and of the assignment, and is within \$77 20 of the entire proceeds. A person served with an injunction owes a different duty from this to the Court whose process he thus tramples upon. It was Bancroft's duty to have stopped the proceedings in the suit at once and forever. Instead of that, he went on with them, and profited by them, in as distinct a manner as if the subterfuge of a nominal assignment to Ross had not been resorted to. He was ordered, by the injunction, to refrain from further proceedings under the attachment. This required him affirmatively to take steps adequate to prevent such proceedings. It was in his power to do so. The injunction did not require him merely to abstain from taking affirmative personal steps to go on with the proceedings. It is a grave error to suppose that, if he personally took no steps to go on, he could refrain from taking any reasonably adequate measures to stop the proceedings, and leave it in the power of his employees to go on in his name, and yet escape the consequences of disobeying the injunction.

The evidence shows the value of the attached goods sold in the Steiner case to have been, at the time of the sale, \$6,691 93. A fine of that amount, with interest

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thereon from July 21st, 1869, must be imposed on Steiner. The value of the attached goods sold in the Bancroft case is shown to have been, at the time of sale, \$2,218. A fine of that amount, with interest thereon from the same date, must be imposed on Bancroft. In addition, the expenses of this contempt proceeding, including a proper counsel fee, to be ascertained by the clerk, on a reference, must be paid by them, as a fine.

A. R. Dyett, for the relator.

R. A. Pryor, for Steiner.

J. Sterling Smith, for Bancroft.

Eastern District of New York.

MARCH, 1873.

THE STEAMSHIP COLUMBIA.

SEAMAN'S WAGES.—DISCHARGE.—DOUBLE PAY.

Seamen shipped on a vessel in New York, for a voyage to Havana and back to New York. On the return of the vessel to New York, they were discharged without payment of any portion of their wages. There was no dispute as to the amount due them. Within ten days after their discharge, they filed a libel against the vessel to recover the wages and ten days' double pay, under the 35th section of the Act of June 7, 1872 (17 *U. S. Stat. at Large*, 262). *Held*, That they were entitled to recover double pay for ten days, although the suit was brought before the expiration of ten days from their discharge.

THIS was an action by seamen to recover wages, and also ten days' double pay, under the 35th section of the Act of June 7, 1872 (17 *U. S. Stat. at Large*, 262).

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The men shipped in New York, and signed articles for a voyage to Havana and back to New York. She arrived in New York on January 11, 1873, and the men were discharged on January 14th. They were not discharged before the U. S. Shipping Commissioner, nor was any portion of their wages then paid them, and on the 22d of January this libel was filed.

For libellants, *Goodrich & Wheeler*.

For claimants, *B. F. Tracy and John J. Allen*.

BENEDICT, J. Under the provisions of section 35 of the Act of 1872, the libellants in this case were entitled to be paid one-fourth of their wages at the time of their discharge, but they were discharged without any payment whatever, and no cause is assigned for the failure to pay them the amount of wages then payable; nor is it claimed that any dispute existed as to the balance then due them. Under such circumstances, they are also entitled to be paid a sum equal to two days' pay for each day, not exceeding ten, dating from the time of their discharge. Failure, without sufficient cause, to pay a seaman, on his discharge, the portion of his wages then payable by law, entitles him to recover double pay for each day's delay thereafter. I was at first inclined to the opinion that the double pay should stop upon the filing of the libel, but, upon reflection, and after examining the practice under the Merchants' Shipping Act of England, of section 187, of which the 35th section of our Act of 1872 is a copy, I incline to the opinion that in a case like this, when there is no dispute, and no reason assigned for the failure to pay the amount due, the right to double pay does not terminate by the commencement of an action to recover the wages earned.

In some cases, at least, such as where the ship is about to leave the port, a seaman will be compelled to

The Ship Ringleader.

commence his suit without delay. Moreover, delay of payment by the owner, made after the commencement of the suit, without any cause, is as prejudicial to the seaman as delay before suit, and should be discouraged. It is always in the power of the owner, as well after as before suit, to terminate the double pay by payment of the wages due. The practice, under the English Act, appears to be in accordance with these views (see *The Princess Helena*, 1 *Lush*. p. 190).

Let a decree be entered in accordance with this opinion.

MARCH, 1873.

THE SHIP RINGLEADER.

SEAMEN'S WAGES.—UNUSUAL CLAUSE IN ARTICLES.—RELEASES IN FULL.

The crew of the Ringleader shipped at San Francisco for a voyage to Hong Kong and other ports, and back to a port of discharge in the United States, under articles, in the heading of which was written a clause reducing their wages after leaving Hong Kong. On the arrival of the ship at the port of discharge, the men were offered pay at the reduced rate. They protested against the reduction, claiming ignorance of the clause inserted, but finally took the reduced pay and gave releases in full. They now brought suit for the balance due, reckoned at full pay for the whole voyage:

Held, That as the clause reducing the sailors' wages was unusual, and inserted in an unusual place in the articles, the ship owner must give clear proof that the sailors were clearly informed of and agreed to it.

Whether such a clause, so written, is valid, *quære*.

That on the evidence the agreement with the men was for \$25 a month for the voyage;

That all agreements and arrangements with sailors are subject to examination in a Court of admiralty, and if unjust will be set aside and disregarded;

That the libellants were entitled to recover the balance due them, notwithstanding their having signed releases in full.

The Ship Ringleader.

BENEDICT, J. The libellants were shipped as seamen on board the ship Ringleader, in San Francisco, for a voyage thence to Hong Kong and other ports, and to a port of discharge in the United States, for a term of 18 months. The articles set forth the rate of wages per month, at \$25 00, but in the heading of the articles was inserted this clause: "The crew to take the current rate of wages out of Hong Kong for the remainder of the voyage." Upon the arrival of the ship in this port, the men were discharged and were tendered wages at the rate of \$15 00 per month, for the voyage since leaving Hong Kong. This they refused to take at first, asserting that they shipped for \$25 00 per month, and were never informed of the existence of the special clause in the articles above referred to. After some delay and vain effort to obtain the wages, which they claimed to be due, the seamen accepted the terms proposed by the ship owner, and were paid off at the rate of \$15 00 per month for the voyage after leaving Hong Kong, and thereupon signed full receipts and discharges. They now bring this action for the unpaid balance of their wages, calculated at \$25.00 per month for the whole voyage. No evidence is produced to show that the men were informed of the existence of the special clause in the articles, and the seamen swear they were not informed as to any such stipulation, and made no such agreement. The clause is unusual, and is placed as part of the description of the voyage, while \$25 00 is plainly stated as the rate of wages opposite each man's name. To sustain such a provision in ships' articles, if it be of any validity whatever, which I doubt, it was incumbent on the ship owner to show clearly that the seamen knew of and agreed to it. Upon the proofs, as they stand, I hold that the agreement made with the men was for \$25 00 per month.

As to the fact that they consented to be paid off at \$15 00 per month, and executed full releases, it is

The Schooner *Dolphin*.

well known that all agreements and arrangements with sailors are subject to examination in a Court of admiralty, and, if unjust, will be set aside and disregarded. Here it is clear that the seamen were forced, by want of money and clothing, to accept an amount less than their due, and so claimed by them to be when it was accepted. A settlement so made under such circumstances, is no obstacle to their recovering the amount justly due them. Let a decree be entered directing that each libellant recover herein the balance of wages due him, calculating the wages at \$25 00 a month from the time of their shipment to their discharge ; and let it be referred to a commissioner to ascertain the amount.

For libellants, *Henry Morris*.

For claimants, *Beebe, Donohue & Cooke*.

MARCH, 1873.

THE SCHOONER DOLPHIN.

SEAMEN'S WAGES.—EVIDENCE.—DAMAGES.

Sailors were shipped in New York for a voyage to San Domingo, at \$25 a month.

They went on board the vessel and went to work, and were afterwards told to go home to their boarding house for meals. On their return they were told that other men had been shipped in their place, and they filed a libel to recover damages for the loss of the voyage. On the trial, the three libellants testified that they returned the next day after they had been told to go home. The master testified that they did not return till the second day, and until after he had obtained other men in their places :

Held, That as the master could have called his mate and the shipping master to sustain him, and had failed to do so, without the suggestion of any difficulty in so doing, the question would be determined according to the statement of the greater number of witnesses ;

That, on the evidence, therefore, the men were discharged without reason, and were entitled to recover damages for the loss of the voyage ;

That half a month's wages was sufficient compensation.

The Schooner Dolphin.

BENEDICT, J. This is a cause of subtraction of wages. There is no doubt, upon the evidence, that these libellants were hired for a voyage to St. Domingo, at \$25 per month; that they rendered themselves on board the schooner and went to work, and that they were afterwards told to go home to their boarding house for meals, because they could not procure the meals on board. The men left the ship, therefore, by permission, and, as they say, returned the next day ready to continue their labors, when they were informed that other men had been shipped, and their services were not required. The master, however, says, that the men did not return the next day, nor until the day after, and until after he had shipped other men, supposing that the libellants had abandoned the voyage. Upon this question of fact in dispute, there are, on the one side, three witnesses, the libellants, and on the other side the master. It lay in the power of the master to remove any doubt by calling his mate, and also the shipping master, who was his agent, and who not only engaged the libellants for him, but also engaged one of the men taken in place of the libellants; and as he has omitted to produce those witnesses, without the suggestion of any difficulty in obtaining their testimony, he cannot complain if the question at issue between him and the men be determined according to the statement of the greater number of witnesses.

It must, therefore, be held, that the weight of evidence is, that the men were discharged without reason, and consequently that they are entitled to recover damages sustained by the loss of the voyage. Half a month's wages will compensate them for this loss, and they may therefore take a decree for \$12 50 each, with costs to be taxed.

For libellants, *Henry Morris*.

For claimants, *Beebe, Donohue & Cooke*.

The Brig Thomas Turrall.

MARCH, 1878.

THE BRIG THOMAS TURRALL.

HALF PILOTAGE.—TENDER.

A Hell Gate pilot, on board of a vessel, claimed to have tendered his services as a pilot to a brig, which he was passing. He alleged that his services were refused, and filed a libel to recover half pilotage. His evidence of the refusal was contradicted by two witnesses from the brig :

Held, That, as there were other witnesses to the alleged refusal, who were not called, nor their absence accounted for, the libellant was not entitled to a decree on such a state of the proofs;

Whether such a tender of services by a pilot is sufficient to entitle him to half pilotage, *quære*.

BENEDICT, J. This case presents a question of fact, upon which the libellant's right to recover depends, and that is whether the libellant's tender of his services as a Hell Gate pilot for the brig Thomas Turrall, was refused by the master of that brig.

The refusal being denied, it was incumbent upon the pilot to substantiate his claim by a preponderance of evidence, but the case has been presented to me upon the testimony of the pilot alone, as opposed to the testimony of two witnesses from the brig. It appears that there were other witnesses to the alleged tender and refusal, but they are not called, nor their absence accounted for.

Upon such a state of the proofs, the libellants cannot have a decree, and the more because the alleged tender of service is conceded to have been made by the pilot while he was on board another vessel, at the time passing the brig here proceeded against. Words exchanged between persons so situated might well be misunderstood, and a tender and refusal made under such circumstances, if relied upon, should be fully proved.

The Bark New York.

I must therefore dismiss the libel for want of preponderating proof of the averments it contains, and it becomes unnecessary to determine the question, whether a tender by a pilot of services, sufficient to afford foundation for a charge of half pilotage, within the meaning of the law, can be made without an actual presence at the side of the vessel sought to be piloted, with the intention and present ability at once to enter upon the service if accepted.

Let the libel be dismissed, and with costs.

For libellant, *F. A. Wilcox.*

For claimant, *Beebe, Donohue & Cooke.*

Southern District of New York.

APRIL, 1873.

THE BARK NEW YORK.

COLLISION AT PIER.—PROPER MOORING.—FENDERS.

A canal-boat lying at a pier was sunk by injuries received by her during the night, in consequence of her coming in contact with a bark, which was also moored there. A libel was filed to recover damages for the injury, which alleged negligence on the part of those in charge of the bark, in not putting out fenders between the canal-boat and the bark and in not having the bark properly moored. The evidence showed that the wound on the canal-boat which caused her to sink was such a one as would have been caused by a fender, and that there was nothing on the outside of the bark which could cause the injury except a fender. As to whether a fender was put out or not, the evidence was contradictory :

Held, That, on the evidence, the presence of the fender was proved, and the charge of negligence, in not putting out a fender, was not established ;

That the bark was properly moored and out of contact with the canal-boat; that the canal-boat drove against the bark, and the bark then did all that could be required of her, by putting out the fender and keeping it there ;

That the bark was not in fault.

The Bark New York.

THIS was a libel by William A. Graham, owner of the canal-boat Elias Tremaine, to recover damages for the sinking of the canal-boat while lying at Pier 62 East river, by a collision between her and the bark New York, which was also moored at the same pier.

For libellant, *Scudder & Carter*.

For claimant, *Beebe, Donohue & Cooke*.

BLATCHFORD, J. The libel does not allege that the bark, when moored, was lying in contact with the canal-boat of the libellant. It alleges that the bark was moored so negligently, that, at some time during the night, she chafed against, or cut into, the canal-boat, causing her to leak; and that the damage was caused by the negligence of those on the bark, "in that they did not take the proper precautions, nor make use of proper seamanship, in putting down fenders" between the canal-boat and the bark, and making use of proper means to keep the bark from crushing in the side of the canal-boat, and in mooring a vessel so large and heavy in the manner they did alongside of the canal-boat.

The evidence as to the character of the wound found in the side of the canal-boat, and which was under water, shows that it was such a wound as would be made by the pressure of a fender. The evidence also shows that there was nothing on the outer side of the bark which could have made such a wound, or any wound, in the place where the wound was, except a fender. The wound was in the place on the canal-boat where a fender, put over the bark's side in the place where the bark's mate says he put a fender over her side, between the bark and the canal-boat, would have come. This tends to corroborate the testimony of the mate, that he did put such a fender over. He says that, during the evening, the wind commenced blowing fresh; that, between 8 and 9 o'clock in the evening, the stem or bow of the canal-

In the Matter of Edward Hagan, a Bankrupt.

boat was driven up under the quarter of the bark ; and that he put a fender over between the quarter of the bark and the canal-boat. It is true that the master of the canal-boat denies that the mate of the bark put a fender over. But, unless there was a fender there, it is impossible to see how the canal-boat was injured. If there was a fender there, it is plain that the injury arose from the pressure of the fender. I am satisfied that there was a fender there, and that the injury was thus caused.

The presence of the fender disposes of the allegation in the libel, that the bark was negligent, in not putting down fenders. I am also satisfied that the libellant has not established that there was any negligence in the manner of mooring the bark, or in respect to the precautions adopted by the bark to keep her from injuring the canal-boat. The weight of the evidence is that the bark was properly moored, and out of contact with the canal-boat ; that it was the canal-boat that was allowed to move and drive against the bark, and not the bark that was allowed to move and drive against the canal-boat ; and that, when the canal-boat so moved, the bark did all that could be required of her, by putting out the fender and keeping it there.

The libel must be dismissed, with costs.

APRIL, 1873.

IN THE MATTER OF EDWARD HAGAN, A
BANKRUPT.

INTEREST ON CLAIMS PROVED.

Creditors, who have proved their claims against the estate of a bankrupt, are entitled to interest on their claims from the filing of the petition to the date of payment, if the bankrupt's estate is sufficient to pay the same to all.

Cushing v. Laird.

IN this case, the register certified to the Court that, the bankrupt's estate being sufficient therefor, he had directed payment of all claims proved against the estate, with interest up to the date of the filing of the petition; that the payment had been made; that there was enough of the estate left to pay interest on all the claims from that date till the date of payment; and that the bankrupt had objected to this latter payment. Thereupon he certified the question to the Court, with his opinion that the interest should be paid.

BLATCHFORD, J. I concur in the view of the register.

APRIL, 1873.

JOHN N. CUSHING *et al.* v. JOHN LAIRD, THE YOUNGER.

FOREIGN ATTACHMENT.—GARNISHEES.—EFFECT OF A DECREE IN A PRIZE CASE.—NOTICE TO MASTER.—PARTY.—ESTOPPEL.—PRACTICE.—ANSWERS TO INTERROGATORIES.—EVIDENCE.

A libel in prize was filed, in June, 1865, against the steamer Wren, in the District of Florida. The master, S., appeared and filed a claim, as bailee for the owner, alleging that L., a British subject, was the owner, as appeared by the register of the steamer. The District Court condemned the vessel as enemies' property, and a writ of *venditioni exponas* was issued, and the vessel was sold, and the proceeds were deposited with the Assistant Treasurer of the United States, in New York, subject to the order of the Court. An appeal was taken from that decree to the Supreme Court of the United States, which reversed the decree, and directed restitution of the vessel to the claimant. F. and T., attorneys, in New York, directed and had charge of this appeal, and paid the expenses of it, and obtained the mandate of the Supreme Court. They then obtained a power of attorney from L. and S., authorizing them to collect the pro-

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ceeds of the Wren, and receive the restitution decreed. After the decree in the Supreme Court, but before the mandate was filed, C. and others, the present libellants, by their proctor, W., filed a libel, in the District Court of Florida, against L., and issued a foreign attachment against the proceeds of the Wren, as his property. F. and T. thereafter employed an attorney in Florida, who filed the mandate and a copy of the power of attorney from L. and S. to them, and entered a final decree in the prize case, directing the payment of the money to L., claimant. The same attorney also entered a special appearance for L., as respondent, in the suit brought by C. and others, and moved to dissolve the attachment. In the mean time, negotiations took place between W., the attorney for C. and others, at New York, and F. and T., looking to a removal of that second litigation to New York, and it was agreed that W. should make no objection to the removal of the fund to New York, and that F. and T. should receive it under their power from L. and S., and hold it long enough to enable W. to take such legal steps as he might be advised. Accordingly, instructions to that effect were sent to Florida, the attachment there was dissolved on the entry of an absolute appearance for L., and the funds were paid to F. and T., in New York. Thereupon this suit was commenced by W., for C. and others, against L., and a foreign attachment was issued against these funds in the hands of F. and T., as the property of L., and the funds were duly attached. F. and T. thereupon appeared, on the return of the attachment. Interrogatories to them were filed, to which they filed answers, denying that they had any funds of L. in their hands, and setting up, that, before the commencement of the prize suit, the Wren had been sold by L. to one P.; that they had acted, in all that they had done, as attorneys for P., and had never been retained by L., and that the proceeds in question were the property of P., and not of L. This issue being brought to trial, the libellants offered in evidence the complete record in the prize case, and the record in the other suit in the Florida Court, and proof of the agreement between W. and F. and T. F. and T. then offered in evidence their own answers to the libellants' interrogatories, and a bill of sale of the Wren from L. to P., dated and recorded before the commencement of the prize suit, and proof of their retainer by P., and not by L. P. was a member of the firm of Fraser, Trenholm & Co., agents of the Confederate States, at Liverpool:

Held, That the answers of F. and T. to the interrogatories addressed to them by the libellants were not evidence in their favor;

That the final judgment in the prize case was a judgment that the Wren was the property of L.;

That neither P. nor F. and T., who had procured that judgment to be rendered, could be heard now to allege the contrary of the fact there adjudged;

That F. and T. were estopped by what had taken place between them and W., from saying, in this suit, that the proceeds of the Wren were not the property of L.

Notice of a prize suit against a vessel, given to her master, is notice to her real owner, and he is a party to such prize suit.

The claimant of a vessel, seized as prize of war, is allowed to give the papers of the vessel in evidence, and is, therefore, bound to see that they are true papers.

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THE question in this case was, whether the libellants, under the attachments issued herein, and levied on certain moneys in the hands of Foster and Thomson, as garnishees, were entitled to regard such moneys, for the purposes of such attachments, as having been, when such attachments were levied, the moneys of the respondent, John Laird, the younger. The libel was filed to recover damages for an alleged maritime tort. After the issuing of the process, several motions were made respecting the attachments and the returns to them, which are reported in 4 *Benedict*, p. 70. Foster and Thomson, the garnishees, having appeared and filed an answer denying the possession of any funds belonging to Laird, the respondent in the action, interrogatories to them were filed by the libellants, and their answers to those interrogatories were also filed. On the trial of the issue between them and the libellants, the former offered in evidence their answers to the interrogatories. These were excluded by the Court, which held that the answers of garnishees to interrogatories proposed to them by the libellants were not evidence in favor of the garnishees. The facts of the case sufficiently appear from the arguments of counsel and the opinion of the Court.

Mr. E. H. Owen, on behalf of the garnishees, presented to the Court the following points :

I. The libellants must establish, by competent testimony, that the proceeds in question were the property of the respondent at the time the attachment was served on the garnishees. The burden of proof is upon them to do this.

(1.) There is no oral testimony upon the subject showing or tending to show that fact. All that the libellants rely upon to establish it is, that the master of the steamer, in and by his claim in the prize suit, stated that, as he was informed and believed, the steamer belonged to the respondent. But that in itself is not sufficient. The

libellants have no greater rights to the proceeds than the respondent. If, under the testimony in this case, he could not recover the same from Prioleau, then they cannot (*Drake on Attachments*, sec. 458).

(2.) It is manifest that, upon the evidence herein, the respondent could not recover these proceeds from Prioleau.

Having sold and conveyed the steamer to Prioleau, in good faith, and by a valid and legal bill of sale, and having received a full and valuable consideration therefor, which he still retains, it would be unconscionable and unjust in him to claim these proceeds, and such a claim would not be allowed, or even tolerated, by this Court.

(3.) But, to evade such an apparent and gross wrong, the libellants invoke the record in the prize suit, as a technical *estoppel*. It is claimed by them, that it was adjudicated in that suit, that the steamer belonged to the respondent, and therefore Prioleau is estopped to deny it in this action. This the garnishees deny. The libellants have no more right in law or equity to insist upon such estoppel, than the respondent would have if he were prosecuting to recover these proceeds; and to allow him to use it, as against Prioleau, would be in the highest degree unjust. An estoppel should not be employed to shut out and exclude the truth, nor where its use will work a wrong or cause injustice. Its whole force and effect are to preclude parties, and those in privity with them, from unsettling a matter which they have in solemn form admitted and adopted, or which has been actually adjudicated. And it cannot be seriously contended, that the prize suit settled, or was intended to settle, the ownership of the steamer as between Prioleau and the respondent. Its whole object and purpose was to determine the *status* of the vessel, that is, whether she was owned by enemies of the Government, or had violated the blockade, and so was a lawful prize of war.

II. But, the decree or sentence offered by way of *estoppel* is not admissible for the purpose of establishing the respondent's title to the proceeds, nor does it estop Prioleau from setting up his title thereto.

(1.) It is *res inter alios acta*. The suit wherein it was pronounced was between other and different parties, the issue was different, and the suit was brought for a different purpose, and therefore inadmissible (*Apsden v. Nixon*, 4 *How.* 467, 499).

(2.) Even as a sentence of a prize court having exclusive jurisdiction of the matter in controversy, it is inadmissible, because it does not purport to adjudicate the question of the actual ownership of the steamer.

In determining what was adjudicated in that suit, this Court should not look at the testimony contained in the printed record, nor at the briefs and points of counsel, nor even at the decision of the Supreme Court, all of which were offered and received under objection, and should now be excluded. But it must look at and examine simply the *sentence*. The law upon this subject is well settled (*Fisher v. Ogle*, 1 *Camp.* 418; *Dalglish v. Hodgson*, 7 *Bing.* 495; *Bradstreet v. Neptune Ins. Co.* 3 *Sumn.* 600, 613-14; *Calvert v. Bovill*, 7 *Term R.* 523; *Christie v. Secretan*, 8 *Term R.* 192; *Ocean Ins. Co. v. Francis*, 2 *Wend.* 64, 68-9; *Bigelow on Estoppels*, pp. 164, 185).

(3.) Upon examining the sentence of the District Court, it appears that that Court did not adjudge that the steamer, when captured, was owned by the respondent, nor that Prioleau was *not* her owner.

The libel did not allege that she was owned by the respondent. It simply alleged that she had been captured and brought into Key West, and that she was "lawful prize of war, and subject to condemnation and forfeiture as such." To this, Stiles, as master and bailee of the vessel, in his own name, filed a claim, denying that she was prize of war, and claiming her "for the

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owner thereof." This was all he had a right or could properly do, since he could not know, and did not pretend to know, to whom she belonged. It was the only proper pleading in the suit. He, however, added that the respondent was owner, as appeared by her register, and as he believed, which was wholly unnecessary, and should be regarded as surplusage. The issue should have been, and was, in fact, simply, prize or no prize. Anything stated in the claim beyond that was "irregular and improper" (The *Cheshire*, *Blatch. Prize Cases*, 152; The *John Gilpin*, *Blatch. Prize Cases*, 291, 292).

This being the true issue, what did that Court decide? The *sentence*, after erroneously reciting that the master had interposed a claim "for and on account of John Laird, the younger," and that it appeared to the Court that the steamer, her tackle, etc., were, at the time of capture, the property of enemies of the United States, proceeds as follows: "It is now ordered, adjudged and decreed, that the steamer *Wren*, her tackle, apparel, furniture, and cargo be condemned and forfeited to the United States, as lawful prize of war." There is nothing in this sentence which adjudicates that the steamer was the property of the respondent, which was indispensable to make it an estoppel in this suit and as against Prioleau.

In the case of *Fisher v. Ogle*, cited above, and which is a leading case, it appeared that the ship *Juno* had been captured by a French privateer, carried into Martinique, and there condemned in the Vice Admiralty Court. The vessel had been insured, being represented to be *American*. In an action on the policy, the defendant, to falsify the representation of neutrality, gave in evidence the sentence of condemnation, which, after stating that, from the papers on board, it resulted that the property belonged to English merchants, who, to mask their property, borrowed the American flag, etc., etc., went on to declare the ship as good and lawful prize, and to

confiscate her and her cargo to the profit of the captors, but without stating any specific grounds for the condemnation. Lord Ellenborough held that the sentence did not say that the ship was *not* American, and that it was not evidence of what it does not specifically affirm; that, looking at the adjudicative part of the sentence, nothing was stated as to the ship or her cargo *not being American*; and the record was excluded. This case was referred to, and fully approved by Mr. Justice Story, in the case of *Bradstreet v. The Neptune Ins. Co.* also cited above, who, speaking of such a sentence, says: "The facts and grounds ought to appear *ex directo*, in order to estop the parties in interest from denying or questioning them, I agree with Lord Ellenborough in *Fisher v. Ogle*, that courts of justice are not bound to fish out a meaning when sentences of this sort are produced before them. Whatever points the sentence professes, *ex directo*, to decide, they are bound to respect and admit to be conclusive. But, if the sentence be ambiguous or indeterminate, as to the facts on which it proceeds, or as to the direct grounds of condemnation, the sentence ought not to be held conclusive." The case of *Dalglish v. Hodgson*, above cited, is to the same general effect. That case determines also that the sentence commences with the adjudicating clause.

In the present case, it commences with the words, "It is now ordered," &c. That this is so appears also by the mandate, wherein the recital of the decree commences with these words. The District Court did not, therefore adjudge that the steamer was *not* the property of Prioleau, nor that she was the property of the respondent, and does not, therefore, estop Prioleau from setting up his title to the proceeds.

(4.) Nor did the Supreme Court adjudge that the steamer was *not* the property of Prioleau, or that she was the property of the respondent. The mandate, after reciting the decree of the District Court (commencing

with the words, "It is now ordered"), and that the cause had been heard, proceeds as follows: "It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed; and it is further ordered, that the cause be, and the same is hereby, remanded to the said District Court, with directions to restore the vessel and cargo to the claimant, without costs." This is all that is said, and there is not in this any adjudication that the vessel belonged to the respondent, or that she did *not* belong to Prioleau. Now there is an evident fallacy in the libellants' argument, "that upon such a libel and such a claim the sentence of the Court established conclusively against all the world," that the steamer was owned by the respondent, so as to preclude inquiry upon that subject in this Court (*Allen v. United States*, *Taney's C. C. Dec.* 112, 116). The master had claimed the vessel "for the owner thereof," and the Supreme Court decreed restitution to the claimant, but that did not affirm the property to be in him, nor in any person in particular. The District Court had not given, as a reason for condemning the vessel, that she was owned by any one in particular. It merely stated, which was not true, that a claim had been filed by the master "for and on account of John Laird, the younger, a British subject." But it did not adjudge that he was or was not the owner of the vessel. Nor was it necessary to do so in order to pronounce such sentence of condemnation. She was condemned as being enemies' property, and such condemnation was reversed on appeal. This case, therefore, comes clearly within those above cited, and, under the rulings therein, the record should be excluded as immaterial and incompetent to prove the respondent's ownership of the property in the hands of the garnishees, or to estop Prioleau from asserting his title to the proceeds (*Allen v. United*

States, *Taney's Decis.* 112; *Millengar v. Hartupée*, 6 *Wall.* 258).

III. The garnishees, in obtaining the proceeds, have not done anything which does, or can, in any manner estop Prioleau from alleging his ownership thereto, nor which estops them from setting up such ownership against the libellants' claim. Representations to the libellants in regard to the ownership of the proceeds will not estop Prioleau from asserting his rights thereto (*Drake on Attachments*, § 629 and note a; *Louis v. Bennett*, 24 *Ind.* 98). But, in fact, no such representations were made either by the garnishees or by Prioleau. Merely obtaining and using the power of attorney from the respondent and Stiles did not acknowledge that the respondent had any right to or interest in the proceeds, or estop the garnishees or Prioleau from disputing his ownership. The power was executed by Stiles, the claimant, as well as the respondent. It was joint and several, and this Court cannot find, from the evidence, that the garnishees used the respondent's power in obtaining the proceeds. His power, as appears by the testimony, was obtained out of caution, for the convenience of the garnishees, to meet such obstacles, if any, as might arise from his name having been improperly inserted in the claim as the owner of the steamer. But he could not avail himself of this to recover the proceeds from Prioleau. He certainly could not do so, even if there had been a collusion between them to mask the real ownership of the vessel, and to have her pass as belonging to him as a citizen of a neutral government. Having obtained the proceeds, the respondent could not, if he would, recover the same from Prioleau (*De Mettoui v. De Millo*, 12 *East*, 234; *Drake on Attachments*, § 458).

IV. Nor did the order of the District Court, entered on filing the mandate, directing the proceeds to be paid to "John Laird, claimant," establish, as against Prioleau, the fact that he was owner of the vessel, or that he

was the claimant. There was no adjudication on that question at that time; nor had there been any previously. The mandate directed that the proceeds be paid to the *claimant*, not to the respondent, and the District Court had no right to assume the determination of that question. Stiles was, in fact, the claimant. He claimed, as master and bailee for the owner, whoever he might be, and the mandate directed payment to be made to him as such claimant. Dockray, whose name appears to have been inserted in the order as proctor for "John Laird, claimant herein," and who moved the Court for a final decree, upon filing the mandate, had no authority so to appear for, or so to use the name of, the respondent. His name was so used without the knowledge of Prioleau or of the garnishees. The fact that Dockray had so used it was not known to the garnishees until after they had received the proceeds, and so they did not acquiesce therein or ratify the same, by receiving the proceeds (*Bell v. Cunningham*, 3 *Peters*, 289; *Hays v. Stone*, 7 *Hill*, 128; *Brass v. Worth*, 40 *Barb.* 648, 654). Moreover, the libellants cannot avail themselves of the acts of Dockray, to establish, by way of estoppel *in pais*, the title of the respondent to the proceeds. They have not suffered any injury by his acts or representations, nor by any acts or representations of the garnishees. They have not parted with anything or lost any rights, and they are therefore "strangers," and not entitled to the benefit of the alleged estoppel (*Com. Dig. Estoppel, C*; *Heane v. Rogers*, 9 *Barn. & Cress.* 577; *Dezell v. Odell*, 3 *Hill*, 225).

V. It was stated, in the presence of the Court, that Prioleau was a member of the firm of Frazer, Trenholm & Co., who were enemies of the Government, and that, if the Supreme Court had known this, it would have condemned the vessel as enemies' property. This, however, is mere conjecture. There is no evidence upon which such inference can be founded, and it is unjust towards

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Prioleau, who, for aught that appears in this case, was a neutral citizen, as well as the respondent. Nor is there any evidence that such firm was an enemy of the Government. The libellants cannot import into this case evidence taken in other prize cases to establish this or any other fact. Nor can this Court take judicial notice of what may have been proved in other cases between other and different parties (*Seymour v. Marvin*, 11 *Barb.* 85, 86).

Whether Prioleau was or was not an enemy of the Government, or what the Court would have directed if his true *status* in regard to the steamer had been known, is wholly immaterial in deciding this case.

VI. The libellants' claim to the proceeds should, therefore, be dismissed, and the suit also dismissed for want of jurisdiction.

T. C. T. Buckley, also counsel for the garnishees, presented the following argument :

Pursuant to the rules and practice of this Court, Foster & Thomson, when cited as garnishees, filed their answer under oath, in which they say, that it is not true "that at the time of the service of the several processes in this action, or at any time since, any goods, chattels, choses in action, property, credits or effects were in their hands, or under their control, belonging to the above respondent."

It is conceded by the counsel for the libellants that the burden of establishing the possession of such funds rests upon them. But, on the facts disclosed by the uncontradicted evidence on both sides, it is established that such proceeds belong to Charles Kuhn Prioleau, and not to the respondent Laird.

The steamer Wren was built by John Laird, Jr., at Birkenhead, in the year 1864.

Her construction was completed in the month of December in that year, and the said Laird, being then her owner, registered her at Liverpool, her home port, on the

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24th of said month, and received from the Custom House authorities a register, which accompanied the vessel.

She then started upon a voyage and never got back to Liverpool.

On the 3d day of January, 1865, Mr. Laird sold the said steamer, then on her voyage, to Charles K. Prioleau, who on that day paid him therefor the sum of £15,450 sterling, as appears by the bill of sale, read in evidence and marked Exhibit No. 1, the execution and delivery of which was admitted on the trial.

The transfer was duly registered in accordance with the laws of England, at the Custom House at Liverpool, is fully appears by Exhibit No. 2, which is in evidence in the cause.

On the 13th of June, 1865, while on a voyage from Havana to Liverpool, her crew mutinied, took possession of the steamer, and ran her into Key West, where she was libelled by the United States authorities as lawful prize of war, the Government of the United States claiming the mutinous seizure as the equivalent of a lawful capture.

At that time she was commanded by one Edward C. Stiles, who, in the discharge of his duties as master, put in a claim on behalf of the registered owner, Laird, Stiles having no information of the facts above recited, with reference to the change of title, and having been placed in charge of the vessel as master only upon her departure from Havana, two days before her capture.

The vessel was condemned on the ground (as appears by the prize record) that, at the time of capture, she belonged to enemies of the United States, the view of the Government being, that she was the public property of the Confederate Government.

Subsequent to this condemnation, Charles K. Prioleau, through his agent, Mr. Sellar, retained Messrs. Foster & Thomson. They, in the discharge of their duty, as Prioleau's counsel, caused the prize record to be removed

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to the United States Supreme Court by appeal, and employed counsel, with a view to obtaining a reversal of the decree, in which they succeeded.

It appears, by the opinion of the Supreme Court (*see* 6 *Wallace*, 583, 586), that the decree below was reversed on the ground that the proof was insufficient to show that, at the time of the capture, the Wren (as was claimed by the United States), was the property of the Confederate Government.

Nothing was decided, or in that case was necessary to be decided, for the purposes either of affirmance or reversal, except the question of the property of the Confederate States; and any ownership of Laird is only referred to by the judge who delivered the opinion, as being a presumption inferable from the contents of the certificate of registry found on board the vessel.

The mandate of the Supreme Court reversed the judgment appealed from, and directed restitution to the claimant, Stiles, who, by virtue of his position, was necessarily, in judgment of law, trustee for the actual owner of the vessel, whoever he might be, and who in this case, in fact, was Charles K. Prioleau.

An attempt was made by the United States officials at Key West, to interfere with the execution of the judgment of the Supreme Court, but, as it has no relevancy to the issue before the Court, it need not be considered.

On the 2d day of July, 1868, for the purpose of collecting the proceeds on behalf of their client, Mr. Prioleau, Mr. Thomson caused to be prepared a power of attorney from Stiles, the claimant, in which, evidently for greater caution, is inserted as well the name of the registered owner, Laird, and the same was sent by him to Mr. F. A. Dockray, whom he retained to collect and remit the proceeds referred to in the power.

At that time, the libellants had filed a libel in the District Court, in Florida, against Mr. Laird, for the

same cause of action as that embraced in the present suit, and were seeking, under process of foreign attachment, to arrest the proceeds of the Wren in the registry of the Court there, and the validity of such attachment was contested.

Some negotiation ensued between Mr. Thomson and the resident counsel of the libellants, Mr. Ward, which resulted in a letter from Mr. Thomson to Mr. Ward, written by mutual arrangement, and containing a suggestion that Foster & Thomson should draw the funds (meaning the proceeds of the Wren in the registry) under their authority from the claimants, Laird and Stiles, and keep the proceeds in their hands sufficiently long to enable Mr. Ward to serve upon them any process that he might be advised.

Mr. Thomson testified, that when, in this letter, he used the expression "claimants, Laird and Stiles," he referred to them as being the parties named in the record of the Supreme Court, and not as actual claimants of the fund. It further appeared, from his evidence, that he never knew or had any communication or correspondence, written or verbal, with the respondent, Laird, but acted throughout, in the whole proceeding, as the representative of Mr. Prioleau, through his agent, Mr. David P. Sellar, and that the power of attorney referred to in his letter to Mr. Ward was received by him from Mr. Prioleau through Mr. Sellar.

Under the arrangement referred to in the letter, as explained by Mr. Thomson in his testimony, the money was received, no stipulation, or understanding, or agreement being claimed to exist outside of the promise of the letter, which was fully acted up to by Messrs. Foster & Thomson, viz., to keep the proceeds long enough to enable Mr. Ward to attach them here if he could.

The obvious advantage resulting to Mr. Ward, and sought for by him, was that, in Florida, the funds were in custody of the law, and here they were not.

Mr. Thomson testifies, that there was no stipulation

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made and entered into between him and Mr. Ward, in reference to any appearance being given either in Florida or here for Laird, and the appearance which, on the face of the Florida record, seems to have been given by Mr. Dockray, was utterly without authority, and unknown to Foster & Thomson until the receipt of his letter of apology, which did not come to hand until after they had drawn the large check.

First Point. Under this process of garnishment the libellants have no greater rights against Foster & Thomson than Laird himself could have.

If Laird could not sue them for the proceeds of the Wren and recover, they cannot be held under the attachment.

1. It is settled law, that it must be affirmatively established that the garnishees have property. No presumption can be indulged in (*Benedict's Admty.* 2 ed. §§ 427, 459 ; *Drake on Attachments*, §§ 458, 461).

2. Even a direct representation made by the garnishee to the creditor, as to funds, if any had been made, would not estop the garnishee, when cited under an attachment, from showing the true state of the case (*Drake on Attachments*, § 629 a).

Second Point. As between Laird and Prioleau, Laird could not either have or enforce any claim to the proceeds of the Wren, which he had sold, and for which he had been fully paid.

1. Payment to Prioleau would have been a perfect defence at law to Foster & Thomson, if sued by Laird.

2. As trustee, holding the legal title, Laird would have been compellable, in equity, to furnish Prioleau with the means of collecting the fund in question.

3. His intervention was, therefore, nothing more than that of a nominal party signing formally a receipt for a fund in which he had no personal interest, and which he was bound to see came into the hands of the representative of his vendee.

Third Point. The libellants' attempted appropriation of Mr. Prioleau's property cannot be maintained. The proceedings in prize, shown by the record, do not estop Prioleau, the true owner of the fund, from showing his ownership, in a collateral controversy between persons who are neither parties or privies to such proceedings in prize.

As against Mr. Prioleau there cannot exist any estoppel in *pais*.

1. No case has ever held that, in a contest between strangers to a record in prize, the real owner of the property, in a collateral controversy, is estopped from showing facts, in reference to his title, which were not before the Prize Court.

The vice of the libellants' argument is, that it overlooks the distinction between the case where title is claimed directly under the decree and the case now before the Court. His counsel rely on loose expressions found in text-books and opinions, without examining the facts of the particular cases cited.

To illustrate and enforce the above proposition, reference is especially made to the case of *Maley v. Shattuck* (3 *Cranch*, 458, 487), where Marshall, Chief Justice, held, that the sentence of a prize Court was not conclusive on a question of title arising in a subsequent proceeding.

It is also laid down, in *Phillips on Evidence*, that the decision of a prize Court is an estoppel only as to the point put in issue and directly determined (1 *Phillips on Evidence*, page 334, and note 627).

2. The well settled rule is, that, to work an estoppel by a record, the parties and subject-matter must be the same (see *Clemens v. Clemens*, 37 *N. Y.* 74).

3. The Supreme Court itself, in a case similarly situated, did not hold a special proceeding an estoppel (*Milling v. Hartup*, 6 *Wallace*, 258).

4. It cannot, for one moment, be disputed, if Laird,

himself, had collected the money, and had paid it over to an agent of Mr. Prioleau's, he, Prioleau, being the beneficiary and equitable owner of the money so paid over, that, in the agent's hands, the property in that money could not be changed back again to Laird by any determination as to Laird's title to the fund before it was paid over.

This is precisely this case ; the proceeds of the Wren, when received by Foster & Thomson, the agents of Prioleau, were, in fact, in the possession of Prioleau himself, and this money cannot be taken, under this process, out of the hands of Foster & Thomson, unless it could be taken out of Prioleau's pocket, in an action by Laird.

5. There is no estoppel in the case ; both parties stood on equal ground ; no representation was made by the garnishees, of any matter of fact.

6. The motives which led either side to consent to the withdrawal of the fund from Florida are not material. By tacit arrangement the motives of the parties were left mutually undisclosed, and it is not for the Court to speculate as to what they were.

Something was said, in the argument, that, if Mr. Prioleau's claim to this money had been presented to the Court at Washington, or in Florida, the result of the original controversy would have been different. There is nothing, in the judgment of the Court on appeal, or in the facts of the case, which warrants such a presumption, but it is difficult to see how that can inure to the benefit of these attaching creditors, who are absolute strangers, in law and in fact, to the proceedings in the Prize Court.

Fifth Point. The garnishees should be discharged, with costs.

R. D. Benedict and J. Langdon Ward, for the libellants, presented the following argument :

First Point. The question before this Court is, whether

John Laird, the younger, was the owner of the proceeds of the Wren when they came into the hands of these garnishees.

The libellants, for proof that he was such owner, rely mainly upon the record evidence of the judgment of the Prize Court.

In considering this evidence, two questions arise, namely :

1. What did the Court decide ?
2. What is the effect of that decision ?

Second Point. The Supreme Court decided that the Wren was the property of John Laird, Jr.

(a) The Wren was libelled simply as prize. The master claimed her, as bailee of said Laird, a British subject, as owner, and for and on account of said Laird, and the Court decided that the Wren was the property of enemies of the United States.

The question before the Supreme Court, on the appeal, therefore, was only this, "whether the vessel was owned by said Laird, a British subject, or by enemies of the United States."

This was the point argued by counsel, and was the very point decided by the Court (see 6 *Wallace*, 586).

The Court say : "The certificate shows that the *claimant* is the builder and *owner*." * * * "The *claimant* not only built the vessel, but put *his* master in command." * * "These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the *claimant*."

Whom did the Supreme Court mean by *the claimant* ? They meant John Laird, Jr. Not Stiles, for he did not build the vessel or put any master in charge of her. Not Prioleau, for he did not appear. The garnishees, who now claim to have represented him, were careful to keep any such idea from the mind of the Supreme Court. They stood by, and their principal stood by, in their persons, and heard the Supreme Court say : "The title to

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this vessel is in the claimant." They knew that the Supreme Court meant, by the claimant, John Laird, Jr., and, when the mandate of that Court directed the vessel to be restored "to the claimant," they knew that that mandate meant to restore it to John Laird, Jr., and to him alone.

And thereupon they procured the decree of the District Court in Florida, which decreed that the money should be restored to John Laird, Jr.

The sole foundation of this decree was, that the Supreme Court had found, as a fact, that, when the Wren was seized, she was the property of John Laird, Jr., and of no one else.

(b) The Supreme Court not only actually did decide this question, but were compelled to decide it. As the counsel for the garnishees aptly puts it, "the whole object and purpose of the prize suit was to determine the *status* of the vessel." She was libelled as prize. All the world were cited to appear and interpose their claims to her. Laird alone appeared, and claimed her as his. Every one else, by their silence, gave up to him such claim on her as they had. The District Court condemned her as enemy's property. This decree necessarily negatived Laird's claim of ownership, and from it Laird appealed. The Supreme Court, in order to determine that the vessel was not enemy's property, had to determine that she was the property of somebody else, and to determine also who that somebody else was, or they could not have told whether she was enemy's property or neutral property.

(c) The garnishees' brief argues that "*Stiles* was in fact the claimant."

This seems to be a most remarkable misrepresentation of the case, or misunderstanding of the law of prize.

1. It is stated that "Stiles claimed, as master and bailee, for the owner, whoever he might be." Not so!

He claimed as "bailee of, and for and on account of, John Laird, Jr.," whom he described as owner.

The garnishees' counsel do not agree on this point, for Mr. Buckley's brief says, that Stiles "put in a claim in behalf of the registered owner, Laird."

2. It is also stated, that the words of the claim, "as bailee of John Laird, Jr., the owner thereof," are "surplusage," and are "irregular and improper," and the cases of *The Cheshire* and *The John Gilpin* are cited in support of this statement. Those cases, however, merely hold, that it is "irregular and improper" to *add to* a claim charges of misconduct against the captors, or defences extraneous to the prize issue.

But the allegation of ownership is *essential*. In the very case of *The John Gilpin*, it is said, "the claim should be one of property merely" (p. 152). Stiles could make no claim of property as master only. Being master, he must claim for the owner. And, so far from its being the case that "he could not know, and did not pretend to know, to whom she belonged," he was bound to know that fact and to state it truly. The master, at least, must be cognizant of the true nature of the transaction.

3. Claims by masters of vessels in this form are frequent in prize cases, but, when they are so interposed, it is not the agent but the principal, not the master but the owner, who is the *claimant*.

We cite the following cases in this Court: *The Crenshaw* (*Blatch. Prize Cases*). Claim filed by Irwin & Co., "in their own behalf and that of Scott & Clarke" (p. 25). * * "The *claimants*, Clarke & Scott, intentionally violated the blockade" (p. 30).

The General Green (*Id.*) Atwell, the master, interposed a claim alleging that the vessel belonged to Mr. Oppenheim. "The only question," says the Court, "is whether the vessel, being owned by the *claimant*, Oppenheim," &c. (p. 40).

The Cheshire (*Id.*) Craig, the master, filed a claim, averring that Jos. Battersby was the owner of the vessel, and Jos. and Wm. Battersby were owners of the cargo (p. 152). But the Court speaks of "the present *claimants*, J. & W. Battersby" (p. 153).

The Sally Magee (*Id.*) Here, also, a claim was interposed by the master (p. 382), but the Court says, "the *claimants* (p. 385) can secure no exemption," &c.

4. The law on this point is clearly enunciated by Mr. Justice Story, in his article on "Prize" (10 *Encyclopaedia Americana*, p. 364, sec. xv, subd. 3). He says: "No claim is permitted to be put in unless by the master or correspondent or agent of the owner, or by the consul of the nation. A mere stranger having no interest is not permitted to claim. It has been already stated that a claimant in a Prize Court *must be* the general owner of the property."

5. The decision of the Supreme Court in the case of The Wren shows that that Court did not consider the allegation of Stiles, that he was bailee of Laird, as surplusage, for that speaks only of Laird as the claimant, never of Stiles as such.

And, if there were any doubts on the subject, these garnishees have made it certain by the final decree which they procured to be entered, directing the proceeds to be restored to "John Laird, Jr., the claimant." Since "a claimant must be the general owner of the property," this decree has the same force as if it read, "restored to John Laird, Jr., the general owner of the property."

6. The counsel of the garnishees (citing *Fischer v. Ogle*), has argued, that this Court can only look at the sentence, and not at the recitals of the decree. It seems somewhat extraordinary, after reading Lord Ellenborough's remarks in that case of *Fischer v. Ogle*, about "the piratical way in which the French sentences proceed," that this Court should be referred to such a case as a rule by which it is to construe the decisions of our own

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Supreme Court and of a sister Court of equal authority with itself, and that, too, in favor of a foreigner as against our own citizens. Other cases show that the recitals are often referred to to throw light upon the sentence (*Pollard v. Bell*, 8 *T. R.* 434; *Bird v. Appleton*, *Ib.* 562; *Kindersley v. Chase*, cited in *Park on Ins.* vol. 2, pp. 743-747-8).

But, even if this Court is limited to looking at the sentence alone, it makes no difference. The mandate directs that the vessel be restored "to the claimant," and the final decree declares that the proceeds are to be restored to John Laird, Jr., the claimant; and the claimant, as we have seen, must be the owner.

Third Point. That decision is conclusive of the fact decided, and cannot be contradicted or questioned.

(a) The judgment of a Prize Court, being the judgment of a Court of exclusive jurisdiction, proceeding *in rem*, is binding on the whole world, and is conclusive both of the right established and of the fact decided.

In *Croudson v. Leonard* (4 *Cranch*, 437), Mr. Justice Washington says: "It is a well-established rule, in England, that the judgment, sentence or decree of a Court of exclusive jurisdiction, directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another Court for a different purpose. It is not only conclusive of the right which it establishes, but of the *fact which it directly decides*. This rule, when applied to the sentences of Courts of Admiralty, whether foreign or domestic, produces the doctrine I am now considering, upon the ground that *all the world are parties* in an Admiralty cause. The proceedings are *in rem*, but *any person* having an interest in the property may interpose a claim," &c.

In *Penhallow v. Doane* (3 *Dallas*, 86), Patterson, J., says: "The sentence of a Court of Admiralty or of Appeal, in questions of prize, binds all the world as to every-

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thing contained in it, because all the world are parties to it. The sentence, as far as it goes, is conclusive to all persons."

And Iredell, J., in the same case, in deciding that the erection of Courts of Admiralty was a function delegated to Congress exclusively, says (p. 91): "A Prize Court is, in effect, a Court of all the nations in the world, because all persons in every part of the world are concluded by its sentences, in cases coming clearly within its jurisdiction. Even in the case of citizen and citizen I do not think it a proper subject for mere municipal regulation, *because, as was observed at the bar, a citizen may make a colorable claim which the Court may not be able to detect, and yet a foreigner be fatally injured by it.* In case of a *bona fide* claim, it may appear to be good by the proofs offered to the Court, but another person, living at a distance, may have a superior claim which he has no opportunity to exhibit."

Palpably, no foreigner could be fatally injured by the presentation of a colorable claim in a case of prize, unless a sentence, awarding the *res* to the colorable claimant, concluded the real owner.

In *Bradstreet v. The Neptune Insurance Co.* (3 *Sumner*, 605), Story, J., says: "That the sentence of a foreign Court of Admiralty and Prize, *in rem*, is in general conclusive, not only in respect to the parties in interest, but also for collateral purposes and in collateral suits, not only as to the direct matter of *title* and *property* in judgment, but also as to the *facts* on which the sentence professes to proceed, although formerly subject to much doubt and controversy, is now a point fully established in Courts of England and the Courts of the United States."

In *Bolton v. Gladstone* (5 *East*, 155), Lord Ellenborough, C. J., says: "Since the judgment of the House of Lords in *Lothian v. Henderson*, it may now be assumed, as the settled doctrine of English law, that the

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sentences of foreign Courts, of competent jurisdiction to decide all questions of prize, are to be received here as conclusive evidence in actions on policies of assurance, upon *every subject immediately and properly within the jurisdiction* of such foreign Courts, and upon which they have professed to decide judicially."

Barzillay v. Lewis (MSS. reported in 1 *Marshall on Ins.* 2d American ed. p. 398), was an action against the insurers. The ship, originally a French vessel, was captured and condemned at Liverpool, where the name *Three Graces* was given her. She was then bought by a Liverpool merchant for a house in Amsterdam, her name translated into Dutch, a Dutch pass was sent her from Amsterdam, she was insured warranted Dutch property, sailed for Amsterdam, and was captured by the French and condemned as the *The Three Graces*, of Liverpool. The insurers put the condemnation in evidence, as proof of a breach of the warranty, and it was held conclusive. Lord Mansfield said: "The warranty meant that the ship was Dutch to the purpose of being protected, and the sentence of the Court of Appeal in France is conclusive. The question, then, is, what the sentence means. The ship is condemned as not being Dutch. The warranty was that she was Dutch, which was false. * * * If the sentence had gone on a ground collateral to the property, the plaintiff would have been permitted to go into evidence to show the truth of the warranty."

In the case at bar, the sentence of acquittal went on the ground that the *Wren* was the property of John Laird, Jr., and was, therefore, *not enemy property*, as which she had been condemned below, and is conclusive on that point. Had the sentence gone on ground collateral to the property, the garnishees might possibly have been admitted to show want of title in the claimant.

Could there be any doubt as to the grounds on which the sentence of acquittal was pronounced by the Supreme Court, after reading the opinion of that Court, and the

decree of the Florida Court entered on the mandate, the certified copies of the briefs of counsel, offered by the libellants, are clearly admissible to resolve the doubt (*Calvert v. Bovil*, 7 T. R. 523).

In this case, where this question was raised, Mr. Justice Lawrence said: "The cases alluded to in the argument seem to have established this, that, if it can be collected from the sentence itself, on what ground the foreign Court decided, that would be conclusive in any action brought in this country. But, if it were ambiguous, or did not show on the face of it on what ground they proceeded, then the Court here might receive evidence to show what were the grounds of the decision abroad."

To the same point are *Hudson v. Guestier* (4 *Cranch*, 293); *Stoughton v. Taylor* (2 *Paine's C. C. R.* 679).

(b) The only case cited in behalf of the garnishees, as opposed to the above authority, is the case of *Maley v. Shattuck* (3 *Cranch*, 458). An examination of that case will show that it is no authority against us. The decree of the Prize Court in that case will be found on page 465, and only adjudged that the vessel and her cargo "were good and lawful prize." When that decree came before the Supreme Court, that Court only held that, as the vessel might have been a good and lawful prize, although she were the property of the neutral claimant, the decree that she was good prize was not a decree that she was not his property (p. 488).

It is a very long step from that decision to the decision which the garnishees seek to procure from this Court, viz., that the decree of a Prize Court restoring a vessel to a neutral claimant, is not a decision that she was his property.

Such a decree of restoration must be a decree that she is the property of the claimant, because, as the Supreme Court say in the case of *The Siren* (7 *Wall.* 154): "When they (the United States) proceed *in rem*, they open to

consideration all claims and equities in regard to the property libelled."

The decision of the Court must, therefore, determine all claims and equities.

(c) The decree of the Prize Court is, of course, effective to pass the title to a vessel which is sold under it. But its effect is by no means limited to that case. Where the question of prize or no prize depends upon the question of enemy's property, the decree of the Prize Court determines the question of the *title to the vessel at the time of the seizure*. That is a fact on which the "direct matter of title and property in judgment," as Judge Story says, is based.

A little consideration will show good reason for this rule. Why does a Prize Court examine the papers of a vessel to determine the question of prize or no prize? Because the law requires: (1.) That "a claimant must be the general owner of the property." (2.) That every vessel shall tell *the truth* about herself; that her papers shall be *true*; and that her master shall be informed of the *true* character of the transaction (Letter of Sir Wm. Scott and Dr. Nichol, given in *Upton on Prize*, p. 268), and, of course, that, when examined as a witness, he shall state that character *truly*. Falsehood, either in papers or testimony, is fatal to the vessel. As Dr. Lushington has said: "The Court of Prize never goes on a mere formal instrument. Over and over Lord Stowell has said: 'It is not the documents themselves which the Court goes upon.' *They must be true. They must be bona fide*" (The Ocean Bride, 2 Spinks, 20).

Acting upon this principle, the Prize Court looks to the papers of the vessel and the evidence of those on board of her, and from them it determines the fact on which the "matter of title and property" depends.

And it must be borne in mind, also, that all the world are parties to a prize proceeding, and for this reason any one may intervene who is the real owner of any part of

the vessel, and may defend his interest as suits him best. In *The Mary* (6 *Cranch*, 144), Marshall, C. J., said: "The whole world, it is said, are parties in an Admiralty cause, and, therefore, the whole world is bound by the decision. The reason on which this dictum stands will determine its extent. Every person may make himself a party and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. When these proceedings are against the person, notice is served personally or by publication; when they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and it is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary*, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

The Prize Court, therefore, virtually says to all the world, in all cases where the question of enemy property is concerned: "We propose to try the question of the title to this vessel, and to try it on these papers on board of her, which are required to tell the truth. If you have anything to say why we should not so determine it, come forward and say it, otherwise hold your peace hereafter."

Thus saying, its determination is conclusive, on the facts involved, against all the world—and so it ought to be. For any one who would afterwards maintain that the facts were not in accordance with the decision, must maintain that the papers of the vessel and the evidence of the master, on which the decree of the Court was founded, did not conform to the truth.

And this no one, who was in any way interested in the matter, will be allowed to maintain.

(d) Look for a moment at the circumstances of this case. Read the remarks of the Supreme Court about the "matters for well-grounded suspicion" in the "facts and circumstances surrounding the history of this vessel."

Can any reasonable man doubt that, if this fact, by which it is now sought to overthrow that decision of the Supreme Court, had been thus made to appear, it would have turned the scales of justice, which obviously hung in doubtful balance?

If the fact of this bill of sale, from Laird to Prioleau, had appeared, either on the registry or on the evidence of the master, is there any doubt as to its effect upon these "well-grounded suspicions?" The status of Mr. Prioleau, as was argued before the Court, "was established by the judicial records of Great Britain and the diplomatic history of the late contest." Counsel might have added, "and by the judicial records of our own Courts." If they had proceeded to read from the opinion of Mr. Justice Clifford, in the case of *The Lilla* (2 *Cliff.* p. 186): "Direct testimony is exhibited in the record which requires explanation. The deponent Gleason testifies that Fraser, Trenholm & Co., of Liverpool and Charleston, owned the vessel and her cargo when she was taken, and that the two houses have the same name in each of those places," Mr. Justice Clifford would probably have said to counsel, as Lord Stowell said, "I do not forget the information which I have received from other cases" (2 *Spinks*, p. 10, n).

Can there be a moment's doubt that this fact was studiously concealed from the knowledge of the Court?

And can this Court now hold that a party who, by concealing a fact from the knowledge of the Court, has procured the decree which he desired, will now be permitted to set up that fact against the decree? If Mr. Prioleau was before the Court, would the Court hear him

saying, "The papers of my vessel did not tell the truth. The master of my vessel either falsified or else did not know the truth of the transaction. I pray you now to allow me to prove that falsity." That would be to overthrow the settled policy and principles of prize law. It would be to offer a premium for concealment and falsification.

(e) The conclusiveness of the judgments of Courts of exclusive jurisdiction proceeding *in rem*, both as to the right declared and the grounds on which the sentence professes to proceed, has been affirmed in many cases other than those of prize.

In *Street v. Augusta Ins. Co.* (12 *Rich.* 13), which was an action on a policy of insurance to recover for damages suffered by a collision, the defendants pleaded the negligence of the plaintiffs as a defence, and offered the sentence of an Admiralty Court condemning the plaintiffs' vessel in damages by reason of such negligence, on a libel by the owners of the other vessel. Held conclusive.

In *Magoun v. New Eng. Marine Ins. Co.* (1 *Story*, 157), which was an action to recover the value of a vessel which rotted pending a litigation to condemn her for smuggling, resulting in her acquittal, the defendants offered to prove probable cause of seizure, which the decree of acquittal negated, and also that the master swore falsely, etc.

Story, J., said: "The most that can be said is, that the master concealed the facts, &c., and that thereby both Courts were misled in their decrees. But concealment of facts would be a new head of the law upon which to avoid a sentence of condemnation or acquittal *in rem*. * * * It appears to me that, independently of fraud (a point which will be presently considered), the sentence is conclusive."

In *The Apollon* (9 *Wheat.* 362), Story, J., says: "A decree of acquittal on a proceeding *in rem*, without cer-

tificate of probable cause of seizure, is conclusive evidence, in every inquiry before every other tribunal, that there was no such cause."

In *Rose v. Himely* (4 *Cranch*, 513), Johnson, J., says: "The jurisdiction of the Court of Admiralty is of a peculiar nature, acting wholly *in rem*, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel. Its decrees are laid down to be conclusive against all the world, a doctrine which, as to the right of property in the subject libelled, is strictly and universally correct, whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of Admiralty jurisdiction, and the Court professes to sit and judge according to the law of nations and the style of the Admiralty." And in the same case Marshall, C. J., says (p. 276): "If the Court of St. Domingo had jurisdiction of the case, its sentence is conclusive."

Whitney v. Walsh (1 *Cushing*, 29) was a case where suit was brought to recover back the purchase money paid for cigars, which, after the sale, were condemned as smuggled. The defendant objected to the record of condemnation because he was not a party to the proceeding. But the Court held that it was not only admissible but conclusive. Wilde, J., says: "It is a well established principle that the sentence or decree of a Court of Admiralty and maritime jurisdiction *in rem* is binding on all the world as to the points in issue and judgment thereon."

Gelston v. Hoyt (3 *Wheat*. 246), was a case where, after acquittal of property seized for violation of revenue laws, without certificate of probable cause, suit was brought against the marshal for damages for the seizure, and, when he offered evidence of probable cause, the decree was held conclusive against him.

Story, J., said: "The reasonableness of this doctrine results, from the very nature of proceedings *in rem*.

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All persons having an interest in the subject-matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits so far as their interest extends. The decree of the Court acts upon the thing in controversy, and settles the title to the property itself, the right of seizure and the question of forfeiture. If its decrees were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons, *toties quoties*, for the same offence, and the claimant be loaded with ruinous costs and expenses."

In *Story's Conflict of Laws*, § 592, it is said: "In cases of this sort (that is, *in rem*) it is wholly immaterial whether the judgment be of acquittal or condemnation. In both cases it is equally conclusive."

(f) Such judgments settle the title to the *res*.

Marshall, C. J., in *Williams et al. v. Armroyd et al.* (7 *Cranch*, 423-32), says: "It appears to be well settled in this country, that the sentence of a competent Court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree." (See also, *Gelston v. Hoyt*, *supra*).

1. The truth of this proposition in cases of sentences of forfeiture or condemnation need be sustained by no quotation of authority.

2. That it is equally true in cases of acquittal, is manifest, since, in such cases, *ex necessitate rei*, the Court must decide to whom the property belongs, in order to determine to whom it shall be delivered.

In the case of *The Panama* (*Olc.* 353), the Court say: "The Court, being rightfully in possession of the funds

representing the ship arrested, must necessarily, as incident to that possession, have power to decide who is entitled to withdraw them from the registry."

In *The Mary Ann* (*Ware*, p. 100), the Court says: "The process acts on the thing itself, and places it in the custody of the Court. When thus in its possession, the Court is bound to preserve it for all who have an interest in it, and not to deliver it but to those who prove a title." To the same effect is *Andrews v. Wall* (3 *How.* 568-573).

3. In close analogy to this case is that of the grant of probate or administration.

Ennis v. Smith (14 *How.* 400). This was an action to recover for the descendants of the sisters of Kosciusko, as his next of kin, funds in the United States, belonging to him and as to which he died intestate. The Court below dismissed the bill on the ground (among others) that the plaintiffs had not proved themselves the next of kin of the deceased. The only proofs offered in that behalf were decrees of the Government of Nobility at Grodno, and of the Court of Kobryn in Lithuania. The competency of the jurisdiction of these tribunals in matters decided upon by these decrees was proven. The Supreme Court reversed the judgment of the Court below, and in their opinion, referring to this decree, say: "It is not a judgment *inter partes*, but a foreign judgment *in rem*, and is evidence of the facts adjudicated, against all the world."

In *Noel v. Wells* (1 *Lev.* 235, 236), it was held, that "a grant of probate or administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares belongs to him. Accordingly, such grant of probate or administration is conclusive against all the world." It may, indeed, be shown that the grant was revoked, for that is the further act of the same Court, or that it was forged, for that shows it not to be the act of the Court at all, or

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that it was granted by a Court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that the will was forged, for those facts might have been alleged in the Ecclesiastical Court in opposition to the grant of probate.

So, in this case, the garnishees may show that the decree of the Florida Court has been reversed, or that the record of that decree is forged, or that that Court had no jurisdiction. But they cannot show that Laird was not the owner of the Wren, for that fact might, and, if true, should, have been alleged in the Prize Court, in opposition to the final decree.

Fourth Point. The judgment of the Prize Court is so conclusive upon the question of the title to this vessel, that if, after that decree of restoration, Laird had taken the vessel, or her proceeds, into his possession, Priolean could not have recovered them from him. If Priolean and Laird were the parties before this Court, the decree of the Court must be for Laird (*DeMetton v. DeMello*, 12 *East*, 234).

This case and the case at bar are singularly alike. This was an action for money had and received to recover the proceeds of a cargo shipped by the plaintiffs at Lisbon for Nantes, captured, libelled as prize, claimed by the defendant, and restored to him. It appeared that the defendant was a clerk for the plaintiffs, and lent his name to neutralize the property.

Ellenborough, C. J., at the Circuit, nonsuited the plaintiffs, on the ground that it did not lie in their mouths to gainsay that the property of the cargo was in the defendant, after he had, with their privity and consent, put in a claim, as owner, before the Court of Admiralty, which had been induced, on that statement of facts, to award restitution of the cargo to the defendant, as neutral property belonging to himself.

A rule *nisi* for a new trial was refused by the King's Bench, with the following opinion :

"Ellenborough, C. J. : I think that the plaintiffs are estopped by their own act in setting up and establishing, in the Court of Admiralty, the claim of DeMello to this property, from now turning around and insisting upon it as their own. If they could have shown that De Mello had acted tortiously, as against them, in setting up a false defence and claim to the cargo as his property in that Court, that might have served them ; but, on the contrary, it appeared that he had acted all through with their privity and consent. DeMello may have behaved like a rogue to the plaintiffs, but both plaintiffs and defendant have behaved wrongfully, as against this country, in colluding to make French property appear to be Portuguese, in the Court of Admiralty, upon the question of prize as against the captors.

"The plaintiffs should go back to the Admiralty, and have the matter set right there, that the opinion of the Court may be taken upon a true statement of facts."

On the authority of this case, therefore, Prioleau could never be heard to say that this vessel was not Laird's property. No case has been suggested by the counsel for the garnishees which points to any different rule. We add the following authorities in support of it :

One making an assertion of acts in Court is estopped thereafter to deny it (*The Mary*, 1 *Mason*, 367).

When a man alleges a fact in a Court of justice for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice (*Wills v. Kane*, 2 *Grant's Cases*, 63).

One who has intervened in a suit on a bottomry bond, as mortgagee, is estopped from claiming the surplus as owner (*The Panama*, *Olcott*, 243).

But the counsel for the garnishees argue, that they received this money as the agents of Prioleau, and that the case is to be treated as though the money was now in the possession of Prioleau himself.

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We think that they should not, in fairness, have put forth such a claim, and that it will not be listened to by the Court under the circumstances of this case.

The garnishees were acting for Mr. Laird. They knew that Mr. Ward represented this claim against Mr. Laird, and had attached this fund as his property. They inform him of their power of attorney from Laird, and they propose to him that they will receive the money "under our authority from the claimants, Laird and Stiles," and hold it here till he should have the opportunity to serve his attachment; and, this proposition being accepted by Mr. Ward, and his attachment having been thereupon vacated by him, they now turn around and say, "We received the money, not under our power from Laird and Stiles, but as agents for Mr. Prioleau."

Such a change of position is neither equitable nor legal.

If Mr. Thomson had stated to Mr. Ward that he was acting for Mr. Prioleau, he would not have obtained the consent to discharge the attachment. He held his peace when he should have spoken. He should be compelled now to hold his peace when he would speak.

"The rule of law is clear, that when one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time" (*Pickard v. Sears*, 6 *Adol. & Ellis*, 469).

Such is this case. Mr. Thomson's words and conduct certainly caused Mr. Ward to believe that Thomson's position was that of attorney in fact for Laird, and that the position of the fund, as to the right to attach it as the property of Laird, would not be affected by its being received by Mr. Thomson. Acting on this belief and assurance, Mr. Ward vacated the attachment. Mr. Thomson is then concluded from averring a different

state of things existing at the time, and alleging that, in receiving the money, he was agent for any one except Laird.

Fifth Point. The above propositions being true, it follows that the evidence offered by the garnishees must be excluded. No evidence can be received against the decree of the Prize Court, unless it be evidence of a title acquired subsequent to the seizure.

(a) But there is no evidence of any such subsequently acquired title. The only evidence offered to prove title in Prioleau is the bill of sale of January 3d, 1865, executed five months before the seizure.

(b) As to this paper, there is no evidence of its *bona fides*, or that it had any actual consideration. Suspicion is cast on it from the fact that it was not recorded at the Custom House at the port of registry, until May 1, 1865, four months after its pretended execution, and that it was never made to appear in the prize proceedings.

(c) The execution of the power of attorney by Laird is entirely inconsistent with the validity of the bill of sale.

(d) That power of attorney and the acts of the parties are consistent with one of three theories, namely :

- (1.) That the bill of sale was never a reality ;
- (2.) A retransfer of the vessel to Laird ; or
- (3.) On the present theory of the garnishees, an attempted fraud on the Prize Court.

On neither theory can it be regarded by this Court.

Sixth Point. On the state of facts here shown, the libellants insist that this Court must decide this case as if this Court were the District Court of Florida. The object and intention of Mr. Ward and Mr. Thomson, in their negotiation, was simply to transfer the litigation to this Court, without in any way affecting their rights. If Mr. Thomson had any other intention, he cannot now be allowed to bring it forward. Now, the District Court

of Florida would never have allowed the party who procured its decree of ownership in Laird, to allege before it that that decree was procured by concealment, and was, in fact, an imposition on the Court. This Court will be no more ready to allow it.

Seventh Point. The procurement by Prioleau of the decree of ownership in Laird, was practically an assignment to Laird of his interest in the vessel, if he had any. He procured a decree to be pronounced, which, *per se*, placed the title to the vessel where it declared it to be. He is in the same position as if he had made, executed, and delivered a bill of sale of the vessel to the claimant. This is now claimed to have been a mere cover for the purpose of defrauding the captors and the United States, and this Court is asked to help the success of the artifice. But a Court of Admiralty, which is a Court of Equity, will not listen to such a claim from these garnishees, who were the active agents in carrying out the transaction.

Their position is analogous to that of one who, having made a conveyance of his property to cover it against his own creditors, should apply to the Court to set the assignment aside, in order to protect it from the creditors of his grantee.

(a) No Court would listen to such a suit (*Jackson v. Dutton*, 3 *Harring*, 98).

(b) The assignment would be held good (*Randal v. Phillips*, 3 *Mason*, 378).

Eighth Point. The garnishees are bound by the appearance of Dockray in Florida. They should have immediately repudiated his action, and returned the funds. They did no such thing, and are bound by that appearance and its effect (*The Sally Magee*, 3 *Wallace*, 457; *Benedict v. Smith*, 10 *Paige*, 130).

How, then, can they say that this fund is not the property of Laird, when, under the compulsion of its being attached as Laird's property, they have given the

appearance for him, which it was the very purpose of the attachment of the fund to compel?

Ninth Point. The sum of the whole matter is this. These garnishees, acting, as they say, as agents for Mr. Prioleau, procured from the Prize Court a decision that a certain state of facts existed. They now seek to avoid the effect of the decree, which was based upon that state of facts, by setting up that the state of facts did not exist.

They cannot be heard to make that allegation. Their action was an admission, of the most solemn character, that Mr. Laird was the owner of the Wren. It was an admission, "on the faith of which a Court of justice has been led to adopt a particular course of proceeding," and such admissions are "conclusive" (1 *Greenl. on Ev.* 12 ed. p. 234, § 204).

It is contrary to public policy that they should be allowed to avoid the effect of that adjudication of the Prize Court, and thus secure for themselves, or for the principal whom they claim to have been assisting, the fruits of a fraud, which, as they seek to show, was practiced upon that Court, not only with the knowledge, but by the active interference of them all.

Allegans suam turpitudinem non est audiendus.

BLATCHFORD, J. On the 16th of June, 1865, the United States filed a libel, in Admiralty, in the District Court of the United States for the Southern District of Florida, against the steamer Wren and her cargo, alleging, in the libel, that certain persons, citizens of the United States, on the 12th of June, 1865, captured the Wren and her cargo, on the high seas, as prize of war; that the captured property had been brought into Key West, in said District; and that it was lawful prize of war, and subject to condemnation and forfeiture as such. It prayed a condemnation of the property. An attachment was issued against the Wren and her cargo, and

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was returned duly executed. A monition, in the usual form, was also issued, returnable June 27th, and was returned duly executed.

On the 26th of June, 1865, a claim and answer signed "Edward C. Stiles, master British steamer Wren," and duly verified, was filed in the cause. It says: "And now comes Edward C. Stiles and says, that he is the master of the said steamer Wren, and, as such, is the lawful bailee of said steamer, her tackle, apparel and furniture, and claims the same for the owner thereof; and he further says, that John Laird, a lawful British subject, residing in England, is the true and *bona fide* owner of said steamer, and that no other person is the owner thereof, as appears by the register of said steamer, now in possession of the Court, and as he is informed and believes." The answer also denied that the steamer was prize of war, and averred that she had no cargo, and prayed restitution.

On the 15th of August, 1865, a decree was made in the cause, in these words: "A claim having been interposed for this vessel and cargo by Edward C. Stiles, master of said vessel, for and on account of John Laird, the younger, a British subject, and this cause having been heard on the libel and proofs and testimony taken *in preparatorio*, and pleadings of the claimant, and all due proceedings having been had, and the Court being fully advised in the premises, and it appearing to the Court that the said steamer Wren, her tackle, apparel, furniture and cargo, were, at the time of capture, the property of enemies of the United States, it is now ordered, adjudged and decreed, that the said steamer Wren, her tackle, apparel, furniture and cargo, be condemned and forfeited to the United States, as lawful prize of war." The decree also ordered a sale of the property.

From the testimony in the prize cause, it appears that the main question in issue was, whether the Wren belonged to Laird, a subject of Great Britain, residing

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in Liverpool, and was *bona fide* neutral property, or whether she was really the property of the Government of the Confederate States, or of the firm of Frazer, Trenholm & Co., acting for and representing such Government. A certificate of registry was found on board of the Wren, at the time of her seizure, dated at Liverpool, December 24th, 1864, signed by a registrar, which specified December 24th, 1864, as the date of registry, and stated that the Wren was British built, and was built by Laird Bros., at Birkenhead, in 1864, that her port of registry was Liverpool, that John Laird, the younger, of Birkenhead, shipbuilder, was the owner of the whole of her, and that William Raisbeek was her master. The Wren, when seized, was on a voyage from Havana to Halifax and Liverpool. She was seized by persons forming part of her crew. She had previously been engaged in running the blockade, into Galveston, Texas, from Havana, and, a short time before she began the voyage on which she was seized, she had entered the port of Galveston, discharged a cargo, taken one of cotton on board, and carried it safely to Havana.

From the decree of the prize Court an appeal was taken, on behalf of the claimant, to the Supreme Court of the United States. On the 16th of October, 1865, a writ of sale was issued, under which the vessel was sold. The proceeds of sale, amounting to \$37,108 50, were deposited with the Assistant Treasurer of the United States, at New York.

The appeal was heard by the Supreme Court, and it reversed the decree of the Court below. The case is reported in 6 *Wallace*, 582. In the decision of the Supreme Court, as reported, the question is stated to be, whether the vessel was the property of the enemies of the United States. It is also stated therein, that the certificate of registry shows that "the claimant" (Laird) is "the builder of the vessel and owner;" that "the proofs show, with reasonable certainty, that his" (Laird's) "reg-

istered master brought the vessel to Havana, and was there engaged in command of her within three months after she was launched and fully equipped for the voyage, and which was within three months of the time when she was seized, as prize, by her crew." The decision proceeds: "It is quite apparent, therefore, upon the proofs, that the claimant" (Laird) "not only built the vessel, but put his master in command, in this, her first voyage, and the presumption would seem very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months which elapsed after she was built, and before the seizure took place. In addition to this, she was in the command of a master" (Stiles) "claiming to represent Laird as owner. These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the claimant." The decision, then, after holding, that most of the proofs relied on to disprove such evidence were "inadmissible and incompetent as testimony in a Court of justice," because they did "not rise to the character or dignity of testimony in any Court that respects the law of evidence," goes on to say: "We agree, that, in the facts and circumstances surrounding and attending the history and operations of this vessel, and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture, as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and, as she entered immediately on furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unreasonable or unnatural to suspect, that the so-called Confederate States, or their agents, had some connection, if not interest in her. But this alone is not evidence on which to found a judgment, in the administration of justice. The facts, that the master, Stiles, who was put in command of her for the voyage home, from Havana to Liverpool, was an officer in the enemies'

naval service, and had belonged to the United States navy, and Helms, who was in some way, not explained, connected with her voyages in running the blockade, and who was the agent of the enemy at Havana, might well be entitled to consideration and weight on the question, if there had been any legal proof in the case laying a foundation for such a conclusion. So, also, would the evidence that Stiles destroyed, at the time of the capture, a letter from Helms, agent of the ship, as he calls him, to himself, and an order for the payment to him of £40, on the delivery of the ship at Liverpool. But, in the view we have taken of the case, there is no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest, or be attached, as auxiliary considerations, to influence the judgment of a Court."

From the language of the decision of the Supreme Court, it is apparent, that, from the fact that Laird bailed the vessel, and that she was registered in his name as builder and owner, and that the master named in the certificate of registry brought her from Liverpool to Havana, and was in command of her at a time less than three months after her registry, and less than three months before her seizure, the Court presumed, because there was no competent evidence to the contrary, that Laird continued to be the owner of the vessel at her seizure, especially as Stiles claimed to represent Laird, as owner. On this the Court concluded that, as Laird was a British subject, and was not shown to be the representative or agent of the Confederate Government, the vessel was not enemies' property at the time of her seizure. It is also apparent, that the Court thought, that, on the facts and circumstances disclosed by the proofs, there was good ground for suspicion that the Confederate Government, or its agents, had some connection with, or interest in, the vessel, but that there was no legal proof of the existence of such connection

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or interest, so as to uphold the decree condemning the vessel as enemies' property.

The master, Stiles, in his deposition, in the prize case, in answer to the interrogatories in prize, states, that the vessel "belonged to one Laird, Junior, as he inferred from the register, and was informed;" that "he believes that one Laird, Junior, was owner of the vessel at the time she was seized;" that "he only knows that from the register," and that "the deponent was engaged to take the vessel to Liverpool and deliver her there to Frazer, Trenholm & Co." The master, also, in that deposition, speaks of Helms as "the agent of the vessel" "at Havana;" and the Supreme Court, in its decision, speaks of Helms as "the agent of the enemy, at Havana."

It appears, by the evidence in the present case, that Foster and Thomson, after the decree of condemnation was made, were retained by one Charles K. Prioleau, who has for many years been a member of the firm of Frazer, Trenholm & Co., to attend, on behalf of Prioleau, to the prosecution of the appeal to the Supreme Court. Foster and Thomson do not know Laird, and never saw him, and never had any communication or correspondence with him, written or verbal. On that retainer, Foster and Thomson caused the transcript of the record on the appeal from the District Court in Florida, to be sent to the Supreme Court, and made the necessary deposit of money with the clerk of the latter Court, and employed counsel to argue, and who did argue, the appeal in the Supreme Court, and they have paid such counsel for his services.

The brief of such counsel, filed in the Supreme Court, on the appeal, asserts it to be shown by the record, that the Wren was never sold or transferred, and was owned by Laird, the younger, at the time of her seizure; that she was owned in England, by an Englishman, and had never been owned by any one else; that she was at

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all times the property of a British neutral; and that, therefore, she was never the property of enemies of the United States. It was not disclosed to the Supreme Court by Foster and Thomson, or by Prioleau, that, prior to the seizure of the vessel, Laird had parted with all his interest in the vessel, or had sold and conveyed her to Prioleau, or that Prioleau had any interest in her at the time of her seizure.

The case was decided by the Supreme Court on the 23d of March, 1868. The mandate of that Court designates the suit as one between the United States, libellants, and "the steamer Wren and cargo, and E. O. Stiles, claimant, respondents." It recites the decree of the District Court in the suit, and then orders that such decree be reversed, and that the cause be remanded to such District Court, "with directions to restore the vessel and cargo to the claimant, but without costs," and then commands such District Court that such further proceedings be had in the cause, in conformity to the opinion and decree of the Supreme Court, as ought to be had.

Foster and Thomson received such mandate, and then drew a power of attorney to be executed by Laird and Stiles, and caused it to be sent to Prioleau, with instructions that he should procure it to be executed by Laird and Stiles, and should cause it to be returned to Foster and Thomson. It was so executed. It bears date July 2d, 1868, and was returned, executed, to Foster and Thomson. By its terms, Laird and Stiles appoint Foster and Thomson their attorneys, "to receive and collect from the United States Government, or any branch or officer thereof, or any depositary thereof, any and all moneys, the avails or proceeds of the sale of the steamer Wren and her cargo, sold under decree of the District or Circuit Court of the United States, at Key West, in the Southern District of Florida, by the marshal of the United States for the said District, the said

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decree having been reversed by the Supreme Court of the United States, on appeal, and this power having been given to our said attorneys for receiving restitution of the avails of the said steamer Wren and cargo."

On the 28th of December, 1868, the libellants in this suit filed in the District Court of the United States for the Southern District of Florida, a libel, in admiralty, against John Laird, the younger, for the same cause of action that is sued on in this suit, and praying the same relief. On the 5th of January, 1869, Foster and Thomson wrote to Mr. Dockray, an attorney in Florida, advising him of such suit in Florida, and employing him to obtain for them the funds in Court in the Wren case, and directing him not to enter a general appearance for Laird in the suit in Florida, but only to move specially to set aside the process and any attachment against the Wren fund. On the 6th of January, 1869, the Court in Florida ordered process to issue in such suit, returnable on the 3d of May, 1869. Such process was issued on the 7th of January, 1869, and was a warrant of arrest bailable in the sum of \$44,622. On the same day such warrant was returned, not served. On the 26th of January, 1869, Foster and Thomson sent to Mr. Dockray a copy of the said power of attorney from Laird and Stiles, in a letter to him which said: "We lay stress on this, as the particular object we have in the matter is to receive the money under it," the power of attorney, "and we wish to have the Judge's check so drawn, that we, as attorneys, may collect it." On the 20th of February, 1869, in the suit in Florida against Laird, an attachment was issued against "the proceeds of sale of the steamer Wren, now on deposit with the Assistant Treasurer of the United States, in the city of New York, and subject to the order of this Court," returnable May 3d, 1869. This attachment was executed by serving a copy thereof, on the 4th of March, 1869, on the Assistant Treasurer of the United States at New York. On the same 20th

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of February, 1869, a monition, in the suit in Florida against Laird, was issued, returnable May 3d, 1869, and was afterwards returned as served by publication in a newspaper published at Key West, and by posting there. Negotiations took place between Foster and Thomson and Mr. Ward, who represented the libellants in the suit in Florida against Laird, and who also represents them in this suit, respecting a disposition of the Wren funds which should transfer them to the city of New York in such manner that process of attachment in this suit should be served on them, and, on the 24th of February, 1869, Foster and Thomson wrote to Ward, suggesting that the District Judge in Florida should forward to them his check on the Assistant Treasurer in New York for the proceeds of the Wren, and that they should draw the funds under their authority from "the claimants, Laird and Stiles," and keep the proceeds in their hands sufficiently long to enable Mr. Ward to serve upon them such process or papers as he might be advised. This proposal appears to have been substantially agreed to by Mr. Ward, for, on the 12th of March, 1869, he wrote to Mr. Bethel, his attorney at Key West, directing him to "make no objection to the forwarding by the Judge," to Foster and Thomson, "of the check for the proceeds of the Wren, in accordance with the mandate of the Supreme Court," and saying: "Until otherwise advised, hold the suit where it is, staying further proceedings for the present, but do not discontinue. If necessary to enable the Court to forward the check, stipulate as may be proper. I enclose a copy of a letter from Messrs. Foster and Thomson to their attorney" (the letter of March 13th to Mr. Dockray, next mentioned), "for your information. Advise me by telegraph the day the check leaves Key West." On the 13th of March, 1869, Foster and Thomson wrote to Mr. Dockray, advising him that Mr. Ward had decided to make no objection to the forwarding by the Judge to

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them, of his check for the money, and enclosing to him a copy of the letter of the 12th, from Mr. Ward to Mr. Bethel, and directing him to obtain the check payable to their order, and to forward it to them. On the 18th of March, 1869, Dockray, who was attorney of the United States for the Southern District of Florida, wrote to Foster and Thomson, saying: "In the case of the steamer Wren, John Laird, owner, &c., I would have written you several weeks ago, if I was at liberty to take any action in your interest. While representing the Government, and bound by the instructions of the Attorney General, it has not been possible for me to serve you as indicated in yours of the 5th of January last. Before the mandate of the Supreme Court of the United States reached the clerk of the Court at Key West, the acting United States Attorney had filed a petition, in a cause of possession, against the proceeds of the sale of the Wren, the monition being returnable December 1st, 1868. The Attorney General, however, directed that no default be taken, nor any other steps, without further instructions. The matter seems to be in a shape to enable you to secure the benefit of the mandate of the Supreme Court of the United States by proper management. It is certainly my duty to obey the terms of the decree of the Supreme Court, as it also is to promptly and efficiently execute any instructions I may receive from the Attorney General. If you will communicate with Senator Osborn, of Florida, at Washington, immediately, you may be able to obtain definite instructions to be forwarded me from the office of the Attorney General. I am precluded at present from taking any steps without further directions." On the 25th of March, 1869, Foster and Thomson wrote to Mr. Dockray, saying, that they had been informed that directions had been sent from the office of the Attorney General to discontinue the suit brought in behalf of the United States against the proceeds of the Wren, and

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adding: "These directions, together with the withdrawal of opposition by Messrs. Cushing, will, no doubt, enable you to obtain and forward the Judge's check to our order." On the 26th of March, 1869, Mr. Dockray wrote to Foster and Thomson, saying that he should move to set aside the process and attachment in the suit brought by these libellants against Laird, in Florida, for want of jurisdiction. On the 13th of April, 1869, the mandate of the Supreme Court, and a certified copy of the power of attorney from Laird and Stiles to Foster and Thomson, were filed in the Court in Florida, the latter paper being filed by Mr. Dockray. Some delay took place in the receipt, by Mr. Dockray, of the instructions from the office of the Attorney General to discontinue the proceeding in the suit referred to, but they were received by him on or before the 8th of May, 1869. On that day Mr. Ward telegraphed to Mr. Bethel, directing him to consent absolutely to forwarding to Foster and Thomson the Judge's check for the proceeds of the Wren, drawn to their order, and to require no bond or stipulation. On the same day, Mr. Dockray, in the Prize Court, in Florida, in the prize case, as "attorney and proctor for John Laird, claimant," exhibited to the Court the mandate of the Supreme Court, and moved for a final decree in accordance with the requirements of the mandate. On the same day, in the suit in Florida brought by these libellants against Laird, a paper was filed in the Court, entitled in the suit, and signed, "John Laird, by F. A. Dockray, attorney and proctor," and reading thus: "And now comes John Laird, the respondent in this cause, and makes his general appearance herein, and claims the proceeds in the registry of this Court, as attached in this suit." The record of the Court states that such appearance and claim was filed by Laird. On the same day, in the same suit, a paper was filed in the Court, entitled in the suit, and signed, "John Laird, by F. A. Dockray, attorney

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and proctor," and reading thus : "And now comes John Laird, by his attorney and proctor, F. A. Dockray, and moves the Court for an order dissolving the attachment herein." Appended to, and filed with, this paper, was a consent signed by Mr. Bethel's firm, as proctors for the libellants, consenting to such motion "absolutely and without stipulation or bond." On the 10th of May, 1869, in the same suit, an order was entered, entitled in the suit, reciting that "John Laird, respondent herein, by F. A. Dockray, his attorney and proctor," had moved for a dissolution of the attachment, and that the libellants, by their attorneys and proctors, had, in writing filed, consented thereto absolutely and without stipulation or bond, and ordering "that the attachment issued out of this Court, upon the proceeds of the sale of the steamer Wren, now on deposit with the Assistant Treasurer of the United States at New York, be dissolved." On the same day, in the Prize Court, in Florida, in the prize case, a decree was entered, reciting the former decree, and the appeal to the Supreme Court, and the action of that Court, and the filing of its mandate, and stating that the costs and expenses in the proceeding, amounting to \$5,666 88, had been taxed and paid to the officers of the Court entitled thereto, out of the proceeds of the sale of the steamer Wren, and then, "on motion of F. A. Dockray, attorney and proctor of John Laird, claimant," decreeing that the remainder of the proceeds of the steamer Wren, amounting to the sum of \$31,441 62, on deposit with the Assistant Treasurer of the United States at New York, and subject to the order of the Court, "be paid to the said John Laird, claimant," and, further, stating that it appeared to the Court, "that Foster and Thomson, of the city of New York, are the lawfully authorized attorneys in fact of the said John Laird, claimant," and then decreeing, "that the said proceeds be paid to the said Foster and Thomson." The record of the Court then proceeds : "Where-

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upon, checks No. 199, for \$29,869 62, and No. 200, for \$1,572, were drawn in favor of Foster and Thomson, of New York, attorneys for Laird and Stiles, as against the proceeds of the steamer Wren, on deposit with the Assistant Treasurer of the United States at New York, which checks were delivered to F. A. Dockray, Esquire, attorney for Foster and Thomson, and attorney in fact for John Laird, and his receipt therefor taken." The receipt is entitled in the prize suit, and is signed, "F. A. Dockray, attorney for Foster and Thomson, of New York, attorney in fact for John Laird, claimant," and is a receipt for the two checks as drawn by the Judge on the Assistant Treasurer, and payable to the order of Foster and Thomson. On the 10th of May, 1869, Dockray wrote to Foster and Thomson, enclosing to them the two checks, and advising them that he would write to them the next day in full, and send to them certified copies of the proceedings had on the dissolution of the attachment. That letter and the two checks were received by Foster and Thomson on the 19th of May, 1869, and on that day the amount of the larger check of the two was paid to Foster and Thomson by the Assistant Treasurer. The amount of the smaller check was paid to them a few days afterwards. After the larger check had been paid, Foster and Thomson received from Dockray a letter dated May 11th, 1869, advising them that he induced Mr. Bethel's firm to consent to the motion for the dissolution of the attachment, by himself agreeing to enter a general appearance for Laird, and stating his reasons for so doing, and sending to them a certified copy of the proceedings.

The funds so in the hands of Foster and Thomson are the funds which have been attached in this suit as the funds of the respondent Laird. It is not shown that Prioleau, or his agents, ever informed the Prize Court in Florida, that, prior to the seizure of the Wren, Laird had parted with all his interest in the vessel, or had sold

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and conveyed her to Prioleau, or that Prioleau had any interest in her at the time of her seizure, or claimed any interest in her proceeds which that Court was restoring; or that any such information was given by Prioleau, or his agents, to Mr. Ward, or to the libellants, prior to the receipt of the fund by Foster and Thomson.

It is now set up by Foster and Thomson, that, in all their transactions respecting this matter, from the commencement of their connection with it, they were acting on behalf of Prioleau, and not of Laird; that they so acted in procuring a reversal by the Supreme Court of the decree condemning the vessel, and in obtaining the money from the Prize Court; and that they knew throughout of Mr. Prioleau's having been, for many years, a member of the firm of Frazer, Trenholm & Co. The inadmissible and incompetent testimony referred to by the Supreme Court, in its decision, was a part of the depositions *in preparatorio*, of persons on board of the vessel, and was presented as tending to show ownership of the vessel in Frazer, Trenholm & Co., on behalf of, and as agents of, the Confederate States. It consisted, partly, of the statement of one witness, that he believed that Frazer, Trenholm & Co. were the owners of the vessel at the time she was seized, that he had heard Helms, at Havana (the same person who is spoken of by the Supreme Court, in its decision, as the agent, of "the enemy," at Havana), speak of Frazer, Trenholm & Co. as the owners of the vessel, that he believed the real and true property of the vessel to be in Frazer, Trenholm & Co., and that he had heard Helms say that he was the agent of Frazer, Trenholm & Co., for the Wren, and other steamers, at Havana; and of the statement of another witness, that he believed the vessel was the property of the Confederate States, and that he so believed, from what he had heard her former master say, with whom he had sailed in her.

As evidence, in the present case, of the fact that

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Prioleau and not Laird, at all times at and after the seizure of the vessel, owned her, and that Foster and Thomson are at liberty to maintain that they hold for Prioleau, and not for Laird, the moneys which they received from the Prize Court in Florida, there is produced to the Court the original of an instrument signed by the respondent Laird, as "John Laird, Jr.," and dated January 3d, 1865, whereby he, described therein as "John Laird, the younger, of Birkenhead, in the county of Chester, shipbuilder," in consideration of £15,450, paid to him "by Charles Kuhn Prioleau, of Liverpool, in the county of Lancaster, merchant," transfers "sixty-four sixty-fourth shares" in the Wren to Prioleau, and covenants that she is free from incumbrances. This bill of sale was registered in the Custom House at Liverpool, May 1st, 1865.

On the part of Prioleau, acting through Foster and Thomson, it is contended, that, under this process of garnishment, the libellants have no greater rights against Foster and Thomson than Laird himself would have against them, as respects the funds in their hands; that, if Laird could not recover the funds from them, or from Prioleau, such funds cannot be held under the attachment in this case against Laird; that, inasmuch as Laird sold the vessel to Prioleau, Laird could not recover these funds from Foster and Thomson, or from Prioleau; that the question is merely one as to who, in fact, owns the funds; that the proceedings in the prize suit do not estop Prioleau from showing, in this suit, that he really owns the funds, and owned the vessel when she was seized; that the libellants have no more right to insist on such estoppel, than Laird would have, if he were seeking to recover these funds from Prioleau; and that neither the original decree of the Prize Court, nor the decree of the Supreme Court, was a decree that Laird owned the Wren when she was seized, or that Prioleau did not then own her.

It clearly appears, by the language of the decree of condemnation made by the Prize Court, that it condemned the Wren, as lawful prize of war, on the ground that she was, at the time of her capture, the property of enemies of the United States. The claim, put in on behalf of Laird, had averred that Laird, "a lawful British subject, residing in England, is the true and *bona fide* owner of said steamer, and that no other person is the owner thereof." The decree necessarily negated this averment of the claim, and, in declaring that the vessel was "the property of enemies of the United States," declared that she was not the property of Laird. On the appeal, the Supreme Court, as appears from its decision, not only decided that there was no legal proof that the vessel was owned by the Confederate States, or their agents, but also decided that there was strong evidence that the title to her was in Laird, who is called by the Court "the claimant," and that he owned her. From the whole case, it is manifest, that the Supreme Court, on the appeal taken on behalf of Laird, in order to find that the vessel was not enemy property, was obliged to find, and did find, that the vessel was the property of Laird, the claimant of her. The decree of the Supreme Court reversed the decree of the District Court, that is, declared, in reversal of the latter decree, that the vessel was, at the time of her capture, not the property of enemies of the United States, and remanded the case, with directions to restore the vessel to the claimant. The claimant was Laird, who claimed as owner; and Prioleau, through Foster and Thomson, as is shown, in fact procured the Prize Court to make a decree that the \$31,441 62 be paid to "John Laird, claimant," that is, to John Laird by virtue of his claim filed in the Prize Court, which was a claim to the vessel as her "true and *bona fide* owner;" and such a decree was made.

In the prize suit, if Prioleau had, in fact, an interest in the vessel, he could have interposed a claim, and put

himself in a position, on the record, to contest the prosecution in the Prize Court, and to be a direct party to an appeal. If, in fact, he became the owner of the vessel ten days after her registry, so that he owned her substantially during the whole of her career, he was, most clearly, a party to the suit *in rem* against her, and Laird was no party. Notice of the suit, by attachment and publication, if notice to the owner, was notice to Prioleau. Notice to Stiles, the master, was notice to Prioleau, the real owner. In this view, Prioleau is bound by the record of the proceedings in the Prize Court (*Croudson v. Leonard*, 4 *Cranch*, 434, 437). The attachment of the vessel in the prize suit, was notice to her owner, and, therefore, notice to Prioleau as such owner, and he was a party to that suit, and the decision in the suit binds him, and is conclusive as against him, and cannot be re-examined in this suit (*The Mary*, 9 *Cranch*, 126, 144; *Bradstreet v. The Neptune Ins. Co.* 3 *Sumner*, 600).

But, beyond this principle, it clearly appearing that Prioleau, through Foster and Thomson, actually prosecuted the appeal in the Supreme Court, and procured that Court and the Prize Court to declare that the averment of ownership in Laird, made in the claim and answer in the prize suit, was true, and, consequently, that his, Prioleau's, present claim of ownership had no foundation, and that he also procured the Prize Court to restore the money, the proceeds of the sale of the vessel, to Laird, as owner, Prioleau is estopped from denying, in this suit, that Laird was such owner. Prioleau did not disclose his ownership to the Supreme Court or to the Prize Court. His assertion now is that he owned the vessel when she was seized. If his claim now were that his interest in her accrued after her seizure, there might, perhaps, be some reason for entertaining a more favorable view of his position. But he permitted Stiles to conceal the true ownership of the vessel, and to assert a falsehood to the Prize Court. That falsehood was as-

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serted nearly six months after the transfer to Prioleau, and nearly two months after the entry of the transfer at the Custom House in Liverpool. Prioleau also permitted the vessel to be sailing with a certificate of registry showing that Laird was her owner, at a time when Prioleau was her owner by bill of sale from Laird, and when such bill of sale had been entered in the Custom House where the original registry, in the name of Laird, as owner, was made. In a case of libel as prize of war, the burden of proving the neutral ownership of the vessel being upon the claimant, the papers of the vessel are allowed to be evidence on the question of such ownership, and the claimant, being thus permitted to resort to them, is bound to see that they are true papers. The British Merchant Shipping Act of 1854 (17 & 18 Vict. ch. 104) provides (§ 57) that every bill of sale for the transfer of any registered ship, when duly executed, shall be produced to the registrar of the port at which the ship is registered, with a declaration made by the transferee, under section 56, and that the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship comprised in the bill of sale, and shall endorse on the bill of sale the fact of such entry having been made, with the date and hour thereof. In the present case, this was done, and the name of Prioleau was entered in the register book, in the office of the registrar, in the Custom House at Liverpool, as the owner of the Wren, on the 1st of May, 1865. The Act also provides (§ 88) that, if, on any change of ownership in the vessel, the owner desires to have the vessel registered anew, it shall be lawful for the registrar of the port at which the ship is already registered, on the delivery up to him of the existing certificate of registry, and on compliance with such of the other requisites to registry as the registrar thinks material, to make such registry anew, and grant a certificate thereof. Prioleau, therefore, might easily, within the five months and a

half which elapsed between the date of the bill of sale and the seizure of the Wren, have procured for that vessel a certificate of registry showing the ownership of her by Prioleau, and which, if on board of her at her seizure, as it ought to have been, would have made it impossible for the Supreme Court to decide that Laird was her owner, based, as that decision was, solely upon the certificate of registry found on board. Is it possible that a Court of the United States can be seriously invoked to sustain Prioleau in committing a fraud of this character on another Court of the United States, and to aid him in securing the fruits of the fraud? If Prioleau had disclosed to the Supreme Court, or to the Prize Court, the fact that the certificate of registry found on board the Wren did not state her true ownership at the time of her seizure, is it not entirely clear that the decree of condemnation would not have been reversed? Prioleau must be held to be barred from the privilege of now denying what he asserted in those Courts, and of now asserting what he denied in those Courts. As between him and the Courts of the United States and these libellants, the vessel and her proceeds belonged to Laird, whatever might be adjudged in regard to such proceeds, if either Laird or Prioleau were seeking to recover such proceeds from the possession of the other.

There is another view of this case. The agents of Prioleau did not disclose to Mr. Ward that the funds belonged to Prioleau, and did not belong to Laird. If they had disclosed to him their intention, when the funds should be released from the attachment in the Florida Court, and be transferred from the custody of that Court, in prize, and should reach their hands, to set up that the funds did not belong to Laird, but belonged to Prioleau, is it, on the state of proofs now disclosed, to be imagined that Mr. Ward would have consented to release the attachment? The libellants, represented by

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Mr. Ward, are entitled to have this Court act upon the matter as the Court in Florida would have acted upon it, if it had been made known to that Court, before the delivery of the funds to Foster and Thomson, and before the release of the attachment, that Prioleau was the owner of the vessel when she was seized. Is it to be imagined that that Court would have delivered the funds to Prioleau, or would have discharged the attachment, as one which, while issued against funds belonging to Laird, had been levied on funds belonging to Prioleau? And yet this Court is asked to deliver the funds to Prioleau, and to hold them not to have been properly levied on as the funds of Laird. This case falls directly within the principle which holds a party concluded by his acts and admissions, on the faith of which a Court of justice has been led to adopt a particular cause of proceeding (1 *Greenleaf on Evidence*, § 204).

In the foregoing views, I have proceeded on the ground that, in fact, Foster and Thomson have regarded themselves as acting throughout for Prioleau, and not for Laird, and have acted throughout for Prioleau as against Laird. But it is such very action which estops them and Prioleau from now saying that the money is not Laird's money. As between them and the Court in Florida, and the Supreme Court, and these libellants, Foster and Thomson received the money as Laird's money, and not as Prioleau's money. And, if they were to claim to hold it for Laird, as against Prioleau, it would seem, on the authority of the case of *De Metton v. De Mello* (12 *East*, 234), that Prioleau could not recover it from them, he having colluded with Laird and Stiles to make the vessel appear to be the property of Laird, and not the property of Prioleau, a member of the firm of Frazer, Trenholm & Co., and to set up a false defence in the Courts of the United States, and to deceive and impose upon such Courts.

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I must, therefore, hold, that, for the purposes of the attachments levied in this suit, the moneys levied on thereunder in the hands of Foster and Thomson, were the moneys of the respondent.

APRIL, 1873.

THE STEAMTUG GENERAL U. S. GRANT.

COLLISION IN NEW YORK HARBOR.—STEAMER AND SAILING VESSEL.—
CHANGE OF COURSE BY THE LATTER.—APPREHENSION OF COLLISION.

A lighter bound from the East river to Jersey City, with the wind free, saw a tug coming down the North river, with a canal-boat alongside. The captain of the lighter, apprehending danger of collision, as he saw no movement on the part of the tug to avoid the lighter, kept away two points. A collision ensued, the canal-boat alongside of the tug striking the lighter on her starboard side, aft of amidships, and causing her to sink:

Held, That the lighter was in fault for changing her course, and was responsible for the collision.

When a change of course is admitted or established on the part of a vessel which is under obligation to keep her course as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former vessel is necessary.

The excuse for a change of course by such a vessel, that the other vessel was taking no steps to get out of the way, is not to be favored.

It is the actual danger of collision which determines the duties of both vessels, and not the apprehension merely.

THIS was a libel filed by the owners of the lighter Gem, to recover the damages occasioned by her being sunk, in a collision with a canal-boat towed alongside of the steamtug General U. S. Grant. The lighter was bound from Pier 3 East river to Jersey City, the wind being northeast. Arriving near Castle Garden, she

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saw the tug coming down the North river, towing a canal-boat, which was fastened to her starboard side, with her bow projecting beyond the bow of the tug. It was alleged, on behalf of the lighter, that the tug kept on, without taking any means to avoid her, and that, as soon as a collision was apprehended, the lighter was kept away two points, in order to avoid it, but she was struck by the canal-boat, nearly amidships, and sunk.

On behalf of the tug, this change of course on the part of the lighter was charged to have been the sole cause of the collision.

For libellants, *Benedict, Taft & Benedict.*

For claimants, *Beebe, Donohue & Cooke.*

BLATCHFORD, J. It being incumbent on the tug to avoid the lighter, or to show a sufficient excuse for her failure to do so, she has assumed the burden of showing that the lighter did not fulfil her obligation of keeping her course, and that the change of course of the lighter was the absolute and direct cause of the collision. The lighter, while admitting a change of course, insists, that such change did not cause or contribute to the collision; that she made the change with a view of avoiding a collision which seemed certain; that, at the time she made it, the tug had made no movement to avoid her, and was coming on a course which was certain to bring the two vessels into collision, unless the one or the other of them made a change; that the change by the lighter was made at so short an interval of space and time before the collision as to make the movement substantially one in the extremity of peril; and, that such change is not to be regarded as a causative or contributory fault.

When a change of course is admitted or established, on the part of a vessel which is under obligation to keep her course, as against another vessel which is bound to

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avoid the former vessel, a very close scrutiny of the conduct of the former vessel is necessary. She has violated an express rule of navigation. Whenever such a change of course has taken place, it is always set up, that the other vessel was taking no step to get out of the way. Such an excuse for a change of course is easily made, but it is not to be favored; because, while it tends to hold rigidly the one vessel to her duty of getting out of the way, it tends to relax the obligation on the other to keep her course. Both duties are correlative, and of equal force. The libel in this case avers, that the lighter, "as soon as a collision was apprehended, was kept away some two points." A vessel whose duty it is to keep her course has no right to change it as soon as she apprehends a collision. In this case, the duty of the tug to keep out of the way of the lighter arose only when the two vessels were proceeding in such directions as to involve risk of collision; and it was under those same circumstances that the duty arose, on the part of the lighter, to keep her course. Therefore, under the statute requiring the lighter to keep her course, her apprehension of a collision could not justify her changing her course. Moreover, it is the actual risk or danger of collision that determines the duties of both vessels, and not the apprehension merely. The rule was made, and is administered, for the very purpose of preventing the vessel charged with the duty of avoiding the other, from being embarrassed by a change of course on the part of the other into danger, on the apprehension that such duty of avoidance will not be fulfilled.

It is alleged, on the part of the tug, that, if both vessels had kept their courses, there would have been no collision, and that the change of course on the part of the lighter caused the collision. It is a rather violent presumption to suppose, as is contended by the lighter, that the tug, in the daytime, and with the lighter in full view, and with the knowledge of her duty to avoid the

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lighter, was on a course which, if maintained, would bring her into collision with the lighter, and had kept up such course to a point too near to the lighter to enable the tug, by any affirmative movement, to avoid the lighter. It is a more reasonable presumption, if the tug was keeping her course, and was making no affirmative movement because of the lighter, that, in fact, there was no risk of collision, and that the apprehensions, on the part of the lighter, which induced her change of course, were unfounded. In this view, the change of course was not in the moment of peril, because there was no peril. The change was the result of apprehension of danger, but groundless apprehension. It would be a very unsafe principle to adopt, that, where there is no danger, and the vessel on which rests the duty of avoidance sees and apprehends no danger, the other vessel may, without ground, apprehend danger, and change her course, and cause a collision, and then claim, that, because the change was made at a very short distance off, and at a very short time before the collision, it was made in the extremity of peril.

In the present case, I am impelled to the conclusion, on all the evidence, that there would have been no collision if the lighter had not changed her course. It is also deserving of remark, that the master of the lighter states, that he put his helm up and kept off, in order to keep clear of the tug. It was not a purposeless change, nor was it one made without reference to the tug. It was deliberate, and in knowing violation of his duty, with reference to the tug, to keep his course.

The conclusion sought to be drawn from the fact that the persons on board of the lighter always saw the tug on the starboard side of the mast of the lighter, namely, that the vessels were on such courses that a collision must have ensued if such courses were not changed, by no means follows. The fact referred to may show that the courses of the vessels could not have been

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parallel, but it does not show that the lines of such courses would not have intersected at a safe distance astern of the tug, nor does it show that the starboarding of the lighter did not bring her directly across the course of the tug.

On the whole case, I must dismiss the libel, with costs.

APRIL, 1873.

THE STEAMTUG NIAGARA.

TUG-BOAT AND TOW.—NEGLIGENCE.—LOOKOUT.

A tug-boat, having a schooner on her port side, and two schooners on her starboard side, was towing them through Hell Gate. In going up the channel between Blackwell's Island and Long Island, a schooner passed them and got some distance ahead, but at the upper end of Blackwell's Island she lost the wind and lost great part of her headway. The pilot of the tug did not observe this as soon as others on the tow did, and ran up quite close to her, and then stopped till the schooner got the wind again and went on, when he started his tug ahead, endeavoring to pass between the schooner and the Long Island shore. This movement and the set of the tide carried the tow too near the Long Island shore, and the starboard schooner struck on rocks and began to leak, and afterwards sank:

Held, That the pilot of the tug was in fault for not sooner seeing that the schooner ahead had lost her way, and taking measures accordingly, and that the tug was liable for the damage.

THIS was a libel by the owners of the schooner Margaret Powell to recover damages for her sinking, while in tow of a steamtug. The tug had taken in tow three schooners, one on her port side and two on her starboard side, to tow them through Hell Gate, the Powell being the outside schooner on the starboard side. While passing Brown's Point, opposite the eastern end of Blackwell's Island, the Powell struck a rock, causing her to

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leak, so that, when she reached near Little Hell Gate, she was cast off and sank.

For libellants, *Beebe, Donohue, and Cooke.*

For claimants, *Benedict, Taft, and Benedict.*

BLATCHFORD, J. The libel attributes the loss of the Margaret Powell to the negligence of the tug, in not slowing when she found that the schooner ahead had substantially lost her headway, in not passing between the said schooner and the Blackwell's Island shore, in passing between the said schooner and the Long Island shore, in changing her course so as to pass Astoria Point in such close proximity thereto as to be unable to prevent the tide and her own headway from causing the Margaret Powell to be carried upon the rocks, in not backing and turning around when she found she was in such close proximity to the rocks, and in not having power enough to control the tow against its headway and the tide. The defence set up in the answer is, that the schooner ahead lost, by the temporary dying out of the wind, a large part of her headway; that the engine of the tug was at once stopped; that the tug and her tows were carried on by the tide alone until the schooner ahead got out of the way, when the engine of the tug was at once set in motion, to proceed; that, by reason of such stoppage, the tug and her tow were carried over by the tide, towards the Long Island shore; that, in spite of every effort of those in charge of the tug, the Margaret Powell was so carried over; that, after passing Brown's Point, the master of the Margaret Powell sung out that his vessel had struck and was leaking; that, after reaching nearly to Little Hell Gate, another tug was signaled, which took hold of her and towed her till she sank; that the Margaret Powell was not properly supplied with pumps, nor were the pumps or pump which could be used on board of her used, as

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should have been done, otherwise she would have been kept afloat; and that the accident was solely caused by the sudden dying away of the wind, for which the tug is in no way responsible.

I think that the case on the part of the libellants is made out, and that the defence fails, on the evidence given by those who were navigating and in charge of the tug.

Hibler, the master of the tug, who was in her pilot house, and steering her, testifies, in his direct examination, that the schooner passed him when he was almost at the lower end of Blackwell's Island; that, at that time, he was going full speed; that the schooner got pretty near up to the other end of the Island, a good distance off; that he slowed down when he was within 300 feet of her; that he did not see that she lost the wind until he got within 100 feet or so of her; that, when he was about ten or fifteen feet off from her he stopped his engine; that he did not reverse it; that the schooner then got the wind and went on, and he rang to go ahead; and that the tide and his stopping was the cause of their being carried over towards Long Island shore. On his cross-examination he testifies, that the schooner got 700 or 800 feet ahead of him, when he had got about half way up the length of the Island; that he could not see her, at that time, because she was hidden from him by the foresail of the vessel in tow on his port side, and that the same cause prevented his seeing her till he got within fifteen or twenty feet of her; and that then he came unexpectedly on her, and stopped his engine, and discovered that she had lost her wind. On his redirect examination, he reiterates the statement that the foresail of the vessel on his port side prevented his seeing the schooner ahead until he was right upon her; and that he went quite a distance with the schooner out of his sight, 400 or 500 feet.

Ward, the engineer of the tug, testifies, that, when he

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got the bell to slow, he looked out and saw the schooner 200 or 300 feet ahead ; and that he got the bell to stop when the schooner was ten or fifteen feet off.

The deck hand on the tug testifies that he noticed the schooner when he heard the bell to slow, and saw that she had not wind enough to sail.

The necessary conclusion from this testimony is, that the tug did not stop her engine soon enough, or as soon as it might have been stopped, if her master had been in a position to observe sooner the losing of the wind by the schooner ahead, or had observed it as soon as, by careful attention, he might have observed it. With the wind as it was, the tendency to have it cut off by the buildings on the Island from a vessel going up on the Long Island side was a well known fact, and the actual losing of the wind by the schooner was observed by persons on board of the vessels in tow at a distance sufficiently great for the tug to have stopped much sooner than she did. Her master confesses to negligence in saying that he did not observe it at the same distance off. It is very clear, that, at the time when he ought to have seen that the schooner had lost her wind, he might have so retarded the onward movement of his boat as to have allowed time for the schooner to get out of the way before he reached her. The consciousness that it was the duty of the tug to stop as soon as the schooner lost her wind, is shown by the averment of the answer that the engine of the tug was at once stopped when the schooner lost a large part of her headway by the temporary dying out of the wind. But that averment is not supported by the evidence.

But, irrespective of this, the weight of the evidence is, that the tug undertook to get by the schooner by going between her and the Long Island shore, and that that caused the accident, coupled with the negligence of the tug in getting up so near to the schooner as to make

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it necessary for her either to hit the schooner or to attempt to go around her.

The allegation in the answer that the Margaret Powell did not have a proper supply of pumps, and that she might have been kept afloat if the pumps she had had been properly used, is not sustained by the proofs.

No such matter is set up in the answer, as that the Margaret Powell might have been put ashore by the other tug, if those in charge of the Margaret Powell had cast off their lines sooner. If she could have been so put ashore, it was the business of the Niagara to see that measures were taken to that end, and to have the lines cut off or cast off. It is not shown that any orders to have the lines cast off sooner came from the Niagara. Moreover, I am not satisfied, by the evidence, that the vessel could have been beached.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain their damages.

APRIL, 1873.

**IN THE MATTER OF JOSIAH S. FERRIS, JR.,
AND FLORENCE MAHONY, BANKRUPTS.**

MARSHAL'S RETURN.—SERVICE OF NOTICE ON CREDITORS.

In a proceeding in involuntary bankruptcy, the marshal returned to the warrant that he had sent notices to the creditors named on a schedule delivered to him by the attorney for the petitioning creditor:

Held, That the return was defective, and must be amended.

The 12th section of the bankruptcy Act, and the 13th General Order must be complied with, as to the manner of serving such notices.

In this case, which was a proceeding in involuntary bankruptcy, the marshal returned to the register the

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warrant, with a return thereto that he had published notice by advertisement, and that he also, within fifteen days after the date of the warrant, sent written or printed notices to the bankrupts, "and to the creditors named on the schedule delivered to me by the attorney for the petitioning creditor, and herewith returned." Objection was made to the sufficiency of the return, in that it did not show that the marshal had fully obeyed the mandate of the warrant, in the matter of notifying the creditors whose names should be given to him by the bankrupts, or, in default thereof, had not shown why he had not done so, and that it did not appear that the statements on which his return was made were in writing, and sworn to by the parties making them. The register thereupon adjourned the first meeting of creditors to a subsequent day, that the marshal might amend his return, so as to show why he had not procured a list of creditors from the bankrupts, or prepared a list from the books and papers of the bankrupts (concerning which he had made no statement), or served the creditors from a sworn statement made. The warrant was sent back to the marshal, who returned it on the adjourned day, declining to make any further return. Objection was made to proceeding under the warrant and return, whereupon the register again adjourned the meeting, and certified to the Court the question whether the return was sufficient, giving his opinion that it was insufficient; that the 12th section of the bankruptcy Act, and the 13th General Order, pointed out clearly the manner in which service should be made on creditors, and of conducting the proceedings, if due service was not had; and that he could not determine, on the return, whether the marshal had pursued the regular and necessary course.

BLATCHFORD, J. The marshal's return is defective in the particulars stated by the register, and must be amended.

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APRIL, 1873.

**ABRAHAM HILL v. THE YACHT AMELIA AND
J. N. TOWNS.****POSSESSION.—EQUITABLE AND LEGAL TITLE TO A VESSEL.**

T. built a yacht, called the A., for D., in payment for which he was to receive a sum of money and another yacht belonging to D. He received part of the money, but did not take possession of the other yacht. D. sold the A. to H., by bill of sale, with the knowledge of T., who was present when the A. was delivered to H., and was employed by H. to take care of her. On the next day, T. took off her sails, delivered them to a cart which H. had sent for them, and took them to H.'s store, and there stored them. Afterwards H. paid T. \$5, on account of his care of the yacht. Some time after, on H. coming for the yacht, T. refused to give her up to him, claiming that she was his own. H. thereupon filed a libel of possession against the yacht and T., to recover possession of the yacht. No papers had been taken out at the Custom House for the yacht till after the sale to H., when T. took out a license on his own certificate, as builder:

Held, That the Admiralty had no jurisdiction of the action.

THIS was a libel filed by the libellant to recover possession of the yacht Amelia. The yacht was built by the respondent, Towns, for one Doncourt. Towns was to be paid partly in money and partly by another yacht belonging to Doncourt. Doncourt paid him part of the money, and told him where to get the other yacht, and ordered it to be delivered to Towns, but Towns did not take it. Doncourt sold the Amelia to Hill, the libellant, giving him a bill of sale therefor. Before Hill paid any part of the price, the three men met at Hill's store, and Towns was informed of the proposed sale, and Hill inquired of him if there were any claims against the yacht, and was told there were none. The three then went to the yacht, where Doncourt, in Towns' presence, delivered her to Hill, and Hill employed Towns to take

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charge of the yacht for him. The next day Hill sent a cart for the sails, which Towns took off and put on the cart, and, going with them to Hill's store, helped to store them there. Hill afterwards, on one occasion, on Towns' request, paid him five dollars, on account of his taking charge of the vessel. Hill thereafter went to get the yacht, when Town refused to deliver her up, claiming that she was his. Hill thereupon filed this libel to recover possession of her. No papers had been taken out at the Custom House for the yacht, until after the sale to Hill, when Towns took out a license on his own certificate, as builder.

For libellant, *Benedict, Taft & Benedict.*

For respondent, *M. Jacobs.*

BLATCHFORD, J. As the legal title to the vessel is in the respondent Towns, and has never passed from him, by a bill of sale, and as the libellant is seeking, therefore, in this suit, to enforce a merely equitable interest against such legal title, and a possession asserted by the respondent under it, I think the case is one of which a Court of Admiralty will not take cognizance, to deliver possession of the vessel to the libellants. A petitory suit, to try the title to a vessel, must be confined to, and based on, a legal title (*Kellum v. Emerson*, 2 *Curtis' C. C. R.* 79, 82; *The S. C. Ives*, 1 *Newberry*, 205, 210). Whatever rights the libellant has must be enforced in some other forum.

The libel is dismissed, with costs.

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THE STEAMBOAT BRISTOL.

THE NARRAGANSETT STEAMSHIP CO. v.
CHARLES CONNOLLY.COLLISION IN NEWPORT HARBOR.—STEAMER AND BARQUE.—FOG.—
MODERATE SPEED.—SIGNALS.

A barque, lying at anchor, near the breakwater, off Newport, Rhode Island, was sunk by a steamboat, in the night, in a fog. The barque was lying in the channel which the steamboat usually passed through in entering the harbor in a fog. The steamboat ran at the rate of fifteen or sixteen miles an hour, till she was within about a mile of the barque, when her engine was slowed, and she ran under that slow bell, blowing her steam whistle occasionally, till very near the barque, before the presence of the barque was known, although a vigilant lookout was kept. A bell was struck on board the barque, but not in a manner adequate to arrest the attention of those on board the steamboat, and no other noise was made upon her, except that the lookout shouted, but too late to be of any avail:

Held, That the steamboat was in fault in not going at a moderate speed in a fog;

That, if the barque had had a vigilant lookout, as he was bound to know the usual hour of the arrival of the steamboat, and bound to know what sound her steam whistle would make, he could, by seasonably making adequate noises on the barque, have made her presence and position known, in season to have enabled the steamboat to avoid her;

That the making of such noises was a precaution required by the ordinary practice of seamen, and the special circumstances of the case, and the barque was, therefore, also in fault, and the damages must be apportioned.

BLATCHFORD, J. The libel in the first of the above cases is filed by the master and the chief officer of the barque B. Rogers, against the steamboat Bristol, to recover, on behalf of the owner of the barque, and of the owner of the cargo, and of the libellants, the damages sustained in consequence of the sinking of the barque,

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through a collision which took place between her and the steamboat Bristol, about half past three o'clock in the morning of the 10th of August, 1872, just outside of the light on the north end of Goat Island breakwater, off Newport, Rhode Island, the barque being at anchor, and the steamboat being on a voyage from New York to Newport, and there being a thick fog at the time. The libel in the other case is filed by the owners of the steamboat against the owner of the barque, to recover the damages sustained in consequence of the sinking of the steamboat through the same collision.

The libel against the steamboat avers, that the barque entered the harbor of Newport, on the 8th of August, 1872, at about five o'clock in the afternoon, and was anchored under the direction of a duly licensed branch pilot, between the Newport harbor light and Rose Island, in a safe and proper and usual anchorage ground for vessels, and out of the usual track of steamers as well as other vessels; that the steamboat struck the port side of the barque about amidships, cutting into her about 18 feet; that the steamboat was running, at the time of the collision, at a high and imprudent rate of speed, about 12 knots an hour; that the weather, at the time, was foggy; that the barque had her light set, and burning brightly, and the steamboat was hailed, and the bell of the barque was rung, in time to avoid the accident, if the steamboat had been reduced to a proper rate of speed; and that the collision occurred through the mismanagement of the steamboat, in going out of her usual course, and at an improper rate, in port, and through a common anchorage ground for vessels, and in neglecting the warning given by the barque's light, and the hail and signal bell of her watch. The answer to this libel avers, that the barque was anchored directly in the track of the steamboat and her consort; that the steamboat was proceeding at a low rate of speed, as low as possible, with the most vigilant lookout and attention;

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that the barque had no watch ; that her bell or signal was not rung or sounded ; that no signal light or lights, as required by law, were shown or used on her, and she was, in all respects, most negligently managed ; and that the collision was entirely the fault of the barque, for want of a lookout, for want of proper signal lights, and in lying, as she was, without giving any signal of her position.

The libel against the owner of the barque avers, that, before the steamboat reached Newport, a fog set in, and the speed of the steamboat was properly reduced ; that the barque was found in the direct track of the steamboat, when the steamboat was near her dock, without any notice or signal from the barque, the barque being so near as to prevent the steamboat from clearing her ; that the steamboat was at once stopped and backed, and all the means possible taken, to avoid a collision ; that the steamboat had her lights properly set and burning, was blowing proper signals, and had a proper watch set and looking out ; that the collision was caused wholly by the fault and want of care and attention of those on the barque, in anchoring where they did, in not having proper signals, and in having no lookout or watch ; and that the same could not have been avoided by those on the steamboat. The answer to this libel avers, that there was no reduction whatever of the speed of the steamboat until she ran into the barque ; that the barque was anchored, under the directions of a duly licensed branch pilot, out of the usual or practicable and safe course for steamers ; that the barque had a light in her fore rigging ; that a bell was rung after the fog arose, and very shortly before the steamboat ran into her ; that, during the whole night, until she was snuk, she had a competent watch on deck, and every requisite precaution was adopted to avoid accidents ; and that the collision was owing entirely to mismanagement on the part of those in command of the steamboat, and especially in

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running out of her course, and at too high speed, in the want of a sufficient lookout, in the negligence of said lookout in attending to his duties, and in omitting to set the lights, and sound her whistle, as required by statute and general usage.

A careful consideration of the evidence in these cases leads me to the conclusion that both vessels committed faults which contributed to the collision. Even if it be conceded that McGrath, the alleged lookout on the barque, struck the bell of the barque, at some time, he did not do so in a manner adequate to attract the attention of those on board of the steamboat. He made no other noise, except to shout. The shouting was begun at a moment too late to be of any avail. The persons on watch on the steamboat were listening attentively for the purpose of hearing sounds from a vessel which might be in the way, but they heard nothing; and all the evidence goes to show, that, if an adequate sound had been made by a lookout on the barque, it would have been heard by those on the steamboat, so that she would have been able, by stopping and backing sooner, to avoid the barque. The barque was lying in a channel which the steamboat always took in a fog. The barque was bound to know this. The fog was very dense. The steamboat kept blowing her steam whistle, as she went along, and a vigilant lookout on the barque, bound to know the usual hour for the arrival of the steamboat, and bound to know what sound her steam whistle would make, could, by seasonably making adequate noises on the barque, have made the presence and position of the barque known, so as to have enabled the steamboat to avoid her. The making of such noises, under the circumstances of this case, was a precaution required by the ordinary practice of seamen and the special circumstances of the case. But, the steamboat was in fault in not going at a sufficiently moderate speed. She maintained her usual speed, of 15 or 16

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miles an hour, until she had cleared Fort Adams, and then slowed by shutting off. At that time she was not over a mile from the barque. She did not stop or back. She had on her the headway derived from a previous speed of 15 or 16 miles an hour, and from there she continued on, under a slow bell, until she was within a few feet of the barque, and a collision was inevitable. The speed of so large a vessel, with her engine still working ahead, could not have been greatly retarded; and some idea of her rate of speed can be formed from the distance she penetrated into the barque. There is no satisfactory evidence that her speed, before sighting the barque, had been reduced below 10 miles an hour. Whatever it was, it had not been reduced to the moderate rate required, in a fog, in entering a harbor where vessels may be expected to be found lying at anchor.

There must be an interlocutory decree, in each case, for an apportionment of damages, based on the holding of both vessels to have been in fault for the collision, all other questions being reserved until the amount of the damages is ascertained.

J. H. Choate and D. D. Lord, for the barque.

Beebe, Donohue & Cooke, for the steamboat.

Eastern District of New York.

APRIL, 1873.

IN THE MATTER OF SAMUEL CANTRELL, A BANKRUPT.

CHATTEL MORTGAGE.—CONTEMPORANEOUS AGREEMENT.

A chattel mortgage was given by C., who was afterwards adjudged a bankrupt. The assignee in bankruptcy having sold the property, the mortgagee petitioned to be paid the proceeds, in satisfaction of the mortgage. It appeared, that an agreement was made, contemporaneous with the mortgage, that the mortgagor should retain possession of the mortgaged property, make sales of it from time to time as he might desire, and receive the proceeds for his own use. The debt for which the mortgage was given was an actual one, and unpaid:

Held, That, under the laws of the State of New York, the mortgage was void, and the petition must be denied.

BENEDICT, J. The question presented for my determination, upon this petition, is, whether the petitioner has a right to claim the proceeds of certain personal property of the bankrupt, taken and sold by the assignee in bankruptcy, because of a chattel mortgage upon the property, held by the petitioner. This mortgage, the assignee insists, is void, for the reason that it has here been shown, by evidence, that an agreement existed between the mortgagor and mortgagee, contemporaneous with the mortgage, that the mortgagor should retain possession of the mortgaged property, deal with and make sales of the same, from time to time, as he might desire, and receive the proceeds for his own use. Upon the evidence, I find that such an agreement existed, and I find further, that the effect of such an agreement is not destroyed by the evidence introduced by the petitioner, which, as I also find, shows an actual loan of the money sought to be secured by the mortgage, and an

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actual present indebtedness of the amount sought to be recovered, namely, \$2,276 25. Under the law of the State of New York, as I understand it, upon such facts, the mortgage should be declared void. Being so found, it gives the holder no right to the proceeds of the property taken and sold by the assignee. The prayer of the petitioner must, therefore, be denied.

Southern District of New York.

MAY, 1873.

IN THE MATTER OF ISAAC ULRICH AND OTHERS, BANKRUPTS.

JURISDICTION.—INJUNCTION ON PETITION BEFORE APPOINTMENT OF ASSIGNEE.

In proceedings in involuntary bankruptcy, on a petition by creditors after an adjudication in bankruptcy, an injunction was issued restraining certain creditors from interfering with the property of the bankrupts. This injunction was served on S., one of the creditors, before an assignee was chosen. Afterwards proceedings were taken to punish S. for contempt, in violating that injunction, which resulted in an adjudication that he was guilty of contempt. He then applied to the Court to vacate the injunction, on the ground that the Court had no jurisdiction to grant the injunction on a petition:

Held, That the Court had jurisdiction to make the injunction which it issued, and that the motion must be denied.

BLATCHFORD, J. On the 27th of March, 1869, in a proceeding in this Court, in involuntary bankruptcy, against these bankrupts, they were adjudged such. On the 3d of April, 1869, the creditors on whose petition the adjudication took place presented a petition to this Court, setting forth the fact of such adjudication, and

representing that the greater part of the property of the bankrupts consisted of merchandise in the State of Illinois; that said property, or some of it, was in the possession of one Kaufman, to whom the bankrupts made a fraudulent assignment in January, 1869; that, since said assignment was made, H. B. Claflin & Co., of the city of New York, and Steiner & Brother, of the same place, had caused attachments to be put on said property, on their claims as creditors of said bankrupts; and that suits were still pending in Illinois, in favor of H. B. Claflin & Co., and of Steiner & Brother, against said bankrupts, in connection with said attachments. The petition prayed, that an order be made by this Court, restraining Kaufman from making any disposition of any of said goods under said assignment, and from any proceedings under said assignment, and also enjoining H. B. Claflin & Co. and Steiner & Brother from taking any further proceedings in their said actions, until the question of the discharge of the bankrupts should be determined, and for such further or other order in the premises as the Court should deem meet. On such petition, this Court, on the 3d of April, 1869, made an order directing that Kaufman refrain from taking any further proceedings under the assignment to him, and from selling or disposing of any of the property assigned to him, except such as was exempt from the operation of the bankruptcy Act, and further ordering that all proceedings in certain actions commenced by H. B. Claflin & Co. and by Steiner & Brother, in the State of Illinois, against said bankrupts, and wherein said assigned property, or a part thereof, had been attached, be stayed "so far as regards proceedings against said property, or any part thereof, except such thereof as is exempt from the operation of the bankruptcy Act," and enjoining and restraining Kaufman, and his agents and attorneys, from further proceedings "as aforesaid" under said assignment, and restraining and enjoining H. B. Claflin & Co.

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and Steiner & Brother, and their agents and attorneys, from further proceedings "as aforesaid" in said actions, until the further order of this Court.

No assignee in bankruptcy was appointed until the 6th of May, 1869. On the 5th of April, 1869, the injunction order was personally served on Michael Steiner, one of the firm of Steiner & Brother, within this District. In October, 1870, attachment proceedings, in the name of the United States, on behalf of the assignee in bankruptcy, as relator, were commenced in this Court, against Michael Steiner, to punish him for an alleged contempt of this Court, in violating the injunction against Steiner & Brother, contained in said order, by proceeding, after the service of such injunction upon him, with the sale of the property attached in the suit brought by Steiner & Brother, mentioned in the injunction order. An attachment against Michael Steiner was issued by this Court, and, after protracted proceedings thereunder, an order was made by this Court on the 29th of March, 1873, adjudging him guilty of the contempt charged against him (see *ante*, p. 392). He now applies to this Court, on behalf of himself and of Steiner & Brother, to vacate, annul and set aside said injunction order, on the ground that it was irregular and erroneous, and that this Court did not have jurisdiction to grant it.

It is contended, on the part of Steiner, that this Court, as a Court of bankruptcy, had no jurisdiction to enjoin Steiner & Brother in the terms contained in the injunction order, on the application of a creditor of the bankrupts, made after adjudication, by a petition, in the exercise of the summary jurisdiction conferred by the 1st section of the bankruptcy Act, or in the exercise of any power of granting injunctions conferred by the 21st section, or by the 40th section of the Act; and that an injunction, in such terms, against Steiner & Brother, could be granted only in a formal suit in equity, on bill

filed, under the jurisdiction conferred by the 2d section of the Act.

It is apparent that the petition for the injunction proceeded, as regarded Steiner & Brother, on the idea that they could be enjoined, under the 21st section of the Act, from proceeding further with their suit against the bankrupts, to collect their debt, until the question of the discharge of the bankrupts should have been determined by this Court. Such is the prayer of the petition, as respects Steiner & Brother. But the Court, in granting the injunction, restrained Steiner & Brother only from further proceeding against the property which, in the suit against the bankrupts, they had attached as the property of the bankrupts.

The question of the jurisdiction of this Court to make the injunction order in question, so far as it restrained H. B. Claffin & Co. and Steiner & Brother, was raised in the contempt proceedings, which proceedings were taken against a member of the firm of H. B. Claffin & Co. as well as against Michael Steiner. In its decision in those proceedings, this Court said: "The creditors' petition for adjudication was filed on the 18th of March, 1869. The order of adjudication was entered on the 27th of March, 1869. The attachments were levied in January and February, 1869. They were, therefore, dissolved by the bankruptcy proceedings. Having authority, by virtue of the adjudication, to issue a warrant to its messenger to take possession of all the estate of the bankrupts, and, among other property, of the property so attached as the property of the bankrupts, and to which the firms of the respondents made no claim except by virtue of the dissolved attachments, this Court necessarily had the incidental and ancillary authority to enjoin these respondents, and their firms, from further proceeding against the attached property in the suits such firms had brought. The authority is derivable from the power given by the 1st section of the bankruptcy Act, to col-

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lect and dispose of the assets, as well as from the power given to the Court by the judiciary Act, to issue all writs necessary for the exercise of its jurisdiction. This injunction was issued on a special petition to that effect, presented by the petitioning creditors after adjudication, and before the appointment of an assignee, and the Court, having jurisdiction of the *res*, had authority to issue an injunction to restrain interference with such *res*."

The same question thus disposed of is now raised directly in the bankruptcy proceedings. It is contended that the power to stay proceedings, given by the 21st section of the Act, is limited to a stay to be made on the application of the bankrupt, and that the injunction provided for by the 40th section of the Act, in involuntary cases, is an injunction which cannot operate, in any event, beyond the time of adjudication, and that there is no other power given to the District Court, by the Act, to grant injunctions, except in a formal suit in equity brought by the assignee in bankruptcy, under the 2d section of the Act. In other words, it is maintained, that, as the 40th section applies only to involuntary cases, and as the 21st section provides only for an application by the bankrupt to stay proceedings, so that he may be afforded an opportunity to obtain his discharge in order to be able to plead it in bar of all proceedings to collect the creditor's debt, this Court is utterly without power, in voluntary cases, as well as in involuntary cases, after adjudication, and before an assignee is appointed, to restrain interference with the acknowledged property of the bankrupt, in the custody of the Court. The doctrine must go to that extent. In involuntary cases, on adjudication, there is a warrant to the marshal to take possession of all the estate of the bankrupt; but, in a voluntary case, there is no warrant of seizure. There may be no person claiming an adverse interest touching the property; or, if there is, and the claim, as in the present

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case, is one founded solely on an attachment by mesne process, it ceases, by operation of law, through the *ipso facto* dissolution of the attachment, the moment the assignee obtains the assignment which alone can authorize him to bring a suit, under the 2d section of the Act, against any person claiming an adverse interest touching any property covered by the assignment. Therefore, at least in a voluntary case, the Court is, according to the doctrine advanced, powerless, between the time of adjudication and the time the assignee receives his assignment, to restrain any person from interfering with admitted property of the bankrupt, in its custody, unless the bankrupt himself can be moved to apply for such interference. This is not the law. Congress has not confided to the bankruptcy Court the important trust of administering the property of adjudged bankrupts, and yet left it without the necessary means of maintaining its authority and jurisdiction in respect of such property. It has the unquestioned power of punishing for contempt those who interfere with property of a bankrupt in its custody. If so, it must have the subsidiary power of restraining persons, by injunction, from interfering with such property, and then punishing them for contempt, if they violate such injunction. These powers have both of them been exercised by many of the bankruptcy Courts, and the right to exercise them has been upheld, on full consideration.

By the 1st section of the Act, the bankruptcy Court has power and jurisdiction, as a part of the proceeding in bankruptcy, to collect all the assets of the bankrupt, and to ascertain and liquidate the liens and other specific claims on such assets, and to duly distribute such assets among all the creditors. In the present case, Steiner & Brother, by attaching, as the property of the bankrupts, the property which they did attach, in the suit they brought against the bankrupts, to collect their claim, as creditors of the bankrupts, admitted such property to be

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assets of the bankrupts, and were, by their attachment, seeking to enforce a lien and a specific claim on such assets. This Court had a right to collect such assets, to take possession of such property as assets, and to ascertain whether such lien and specific claim existed and should be admitted. Hence, it follows, logically and inevitably, that this Court had a right to prevent, by injunction, the claimants of such lien, and all other persons, from proceeding against the specific property and assets attached, and from interfering with or disposing of the same, under and by virtue of the lien claimed. Otherwise, if the assets attached should be disposed of under the lien, and in the suit in which they were attached, there would be no such assets for this Court to collect, and no lien or specific claim thereon for this Court to ascertain, and no power in this Court to distribute such assets, either by awarding them to the claimant of the lien, or dividing them among creditors generally.

In the case of *In re Schnepf* (2 *Benedict*, 72), in the District Court for the Eastern District of New York, Judge Benedict recognizes the power of granting an injunction as included in the other powers conferred on the Court by the 1st section of the Act, in a case where a voluntary bankrupt obtained, after adjudication, an injunction from the bankruptcy Court restraining judgment creditors from enforcing a levy under execution against his property.

In the case of *In re Wallace* (2 *Bankrupt Register*, 52), in the District Court in Oregon, Judge Deady, in a well-considered opinion, takes the same view, in a case where the bankrupt, after adjudication, obtained an injunction to restrain some of his judgment creditors from selling his property on execution.

In the case of *In re Vogel* (2 *Bankrupt Register*, 138, and 7 *Blatchf. C. C. R.* 18), in this Court, after the filing of a voluntary petition by a bankrupt, some persons took some of his property by replevin proceedings. This

Court made an order that they deliver up the property to the assignees, or pay its value, within a time limited, and that, in default thereof, attachments issue against them for contempt. The order was made on the petition of the assignees. The jurisdiction of the Court to administer the property was conferred upon it by the 1st section of the Act, in the clauses before referred to, and its power to punish for contempt those who interfered with such property, while in its custody, was regarded as an incident of its jurisdiction to administer the property so in its custody. The order of this Court was affirmed by Mr. Justice Nelson, in the Circuit Court, on review. On this principle, Steiner and Bancroft might have been punished for contempt, if there had been no injunction, for interfering with the admitted property of the bankrupts, by selling it after adjudication. If so, there can be no well founded objection to the power of the Court to give them warning in advance, so that they may refrain from committing such contempt. At least, they ought not to be heard, after they have committed the contempt of selling the property, to object that the Court gave them warning beforehand.

In the case of *In re Mallory* (6 *National Bankruptcy Register*, 22), in the District Court for Nevada, Judge Hill-
yer, in an opinion reviewing all the cases on the subject, sustained the power of the District Court to grant an injunction which a voluntary bankrupt applied for, after adjudication, to restrain a sheriff from selling property of the bankrupts, levied on under an execution on a judgment obtained before the commencement of the proceedings in bankruptcy. The power is referred by the Court, in its opinion, to the jurisdiction given by the 1st section of the Act, as delegating, at the same time, by necessary implication, the power to administer such remedies, known to the law, as are absolutely indispensable to the complete exercise of the jurisdiction expressly conferred, and as giving the right, in collecting

the assets, to employ the proper legal process for effecting the result. The report of this case shows that, in a review of the decision of the District Court, the Circuit Court (Mr. Justice Field), affirmed it, stating that he concurred in both the reasoning and the conclusion of the District Judge, and that that opinion presented the law in a clear and satisfactory manner.

In the case of *In re Clark* (9 *Blatchf. C. C. R.* 372), the District Court for Vermont, in the exercise of its summary jurisdiction under the 1st section of the Act, and on the petition of the assignee in bankruptcy, enjoined a creditor of the bankrupt's from further prosecuting, in a State Court, a suit against the bankrupt, in which the creditor was seeking to establish a lien on the bankrupt's property. The case being brought before the Circuit Court, it was contended, by the creditor, that the District Court had no power to proceed summarily in the case. Judge Woodruff, in his decision, upholds the power of the District Court, under the 1st section of the Act, to assume the entire administration of the estate of the debtor, to determine all questions touching the existence of liens thereon, to ascertain and settle the amount of such liens, and to make provision for the liquidation and settlement thereof, and, as incidental to this, to restrain a claimant of such lien from proceeding elsewhere to enforce his lien. He also holds that such power may be summarily exercised, without a formal suit; and that, although, in some cases, the assignee may be unable to secure all the relief he needs without a formal suit, yet, when the property affected by a lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of the District Court is entirely adequate.

There can be no sound reason whatever given for permitting the assignee, after his appointment, or the bankrupt, after adjudication, and before the appointment of an assignee, to procure from the Court an injunction of

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the character indicated, which should induce a denial of the power to grant such an injunction, after adjudication, and before the appointment of an assignee, on the application of any creditor, much less of the petitioning creditor, who has, by the fact of adjudication, a debt established by the record. There is no assignee, the bankrupt is not supposed to be looking especially after the interests of his creditors, and he may be in collusion with the creditor who ought to be enjoined, and it is eminently proper that the equitable power of the Court should be set in motion by the petitioning creditor, or even by any creditor, either in a voluntary case or in an involuntary case, the action of the Court being for the benefit of the creditors generally.

It is urged that the views of the Supreme Court in the case of *Smith v. Mason* (14 *Wallace*, 419), are opposed to the jurisdiction I have maintained. But I do not so understand that case. In the present case, the petition on which the injunction was granted prayed for no adjudication as to the rights or claims of *Steiner & Brother*, and the time had not arrived when any formal suit could, under the 2d section of the Act, be brought, because no assignee was in existence to bring any such suit. All that is determined by the case of *Smith v. Mason* is, that a District Court, sitting in bankruptcy, in the exercise of the summary jurisdiction conferred by the 1st section of the Act, cannot proceed, on the petition of an assignee in bankruptcy, to determine a right of property, as between such assignee and a person who claims the absolute title to, and dominion over, a fund, the absolute title to which such assignee also claims, and that, if such assignee wishes to divest such person of the possession of such fund, he must do it by a formal suit, under the 2d section of the Act.

The motion to vacate the injunction order is denied.

Roger A. Pryor, for the motion.

Anthony R. Dyett, opposed.

The United States v. One Case, Marked J. N. Blum.

MAY, 1873.

**THE UNITED STATES v. ONE CASE, MARKED
J. N. BLUM, CONTAINING TWO DOZEN
PINT BOTTLES, &c., OF IMITATION SPARK-
LING WINE.**

**INTERNAL REVENUE.—IMITATION SPARKLING WINE MADE FROM GRAPES
GROWN IN THE UNITED STATES.**

The 48th section of the internal revenue Act of July 20th, 1868, as amended by the 12th section of the Act of June 6th, 1872 (17 *U. S. Stat. at Large*, 240), imposes a tax, to be collected by affixing a stamp on each bottle, "on all wines, &c., made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States." An information was filed against certain wines, alleging that they were imitation sparkling wines, made "by the direct injection of carbonic acid gas, by a wholly mechanical process, into wines made from grapes grown in the United States, not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes) with said carbonic acid gas injected therein as aforesaid, to make a new product known as and being an imitation sparkling wine or champagne." The claimant of the wine demurred to the information:

Held, That the article was none the less free from tax, as being "made from grapes grown in the United States," notwithstanding the carbonic acid gas was injected by a separate process of manufacture.

BLATCHFORD, J. This suit is brought by the United States against a case containing certain "bottles of imitation sparkling wine," seized as forfeited under the internal revenue laws. The information sets forth, "that the contents of the said bottles contained in the said case of imitation sparkling wine, were then and there wines, liquors or compounds, known or denominated as wine, and were made by a certain manufacturer of imitation sparkling wine or champagne, to wit, by J. N. Blum, at his manufactory of such wines in the city of New York, by the direct injection of carbonic acid gas,

by a wholly mechanical process, into wines made from grapes grown in the United States, not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes), with said carbonic acid gas injected therein as aforesaid, to make a new product known as and being an imitation sparkling wine or champagne;" and "that the said wines, liquors or compounds, known or denominated as wine, and made in imitation of sparkling wine or champagne, as aforesaid, and found and seized as aforesaid, were subject then and there, and when made as aforesaid, to tax, by the statute of the United States in such case made and provided and, when found and seized as aforesaid, the same had been sold by the said manufacturer thereof, and had been removed from his said manufactory, without having on the said bottles containing the same any stamps affixed denoting the tax thereon, nor has any tax in any manner ever been paid on said wines, liquors or compounds, contrary to the form of the statute of the United States in such case provided, whereby, and by force of the statute of the United States in such case provided, the said contents of the said bottles, and the said bottles and case, became and are forfeited to the United States." The claimant demurs generally to the information.

The 48th section of the Act of July 20th, 1868, as amended by the 12th section of the Act of June 6th, 1872 (17 *U. S. Stat. at Large*, 240), imposes a tax, per bottle or package (to be collected by affixing a stamp on each bottle or package containing the article, by the person manufacturing it, before removal from the place of manufacture), "on all wines, liquors or compounds known or denominated as wine, and made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States."

The information in this case states that the article seized is known or denominated as wine, and is made in imitation of sparkling wine or champagne. The information does not state that the article is not made from grapes grown in the United States. The tax is not imposed on an article made from grapes grown in the United States. The information aims to aver, argumentatively, that, inasmuch as the article was made in imitation of sparkling wine or champagne, "by the direct injection of carbonic acid gas, by a wholly mechanical process, into wines made from grapes grown in the United States, not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes), with said carbonic acid gas injected therein as aforesaid, to make a new product known as, and being, an imitation sparkling wine or champagne," it was, therefore, not made from grapes grown in the United States. But, the information avers that grapes grown in the United States were made into wines, and that such wines were the completely fermented juice of said grapes, and that the wines so made were afterwards converted into an imitation of sparkling wine by the additional mechanical process of directly injecting carbonic acid gas into them. It further says that, by such process, the article seized was "made," and that such process was a process of "manufacture," and was used to "make" a new product, being the article in question, and that the article, when so made, is an imitation sparkling wine, and is "made" in imitation of sparkling wine. The information, therefore, substantially avers, that the article in question was made from grapes grown in the United States. If so made, it was not taxable.

It is urged, that the expression, in the statute, "made from grapes grown in the United States," means,

made by the natural process of fermentation, and that the article is not, in the sense of the statute, "made in imitation of sparkling wine or champagne," "from grapes grown in the United States," if the carbonic acid gas is injected into the wine directly by mechanical means, instead of being created in the wine by the process of fermentation taking place therein. The word "made" occurs, in the clause in question, in two places. But there is no warrant for saying that that word can have a different meaning attached to it, where it occurs in the one place, from what it has where it occurs in the other. The tax is imposed, in terms, "on all wines, liquors or compounds, known and denominated as wine, and made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States." When the article is put into such a condition as to imitate sparkling wine, it is spoken of as "made" and as "made in imitation." Whatever the process by which the imitation is produced, the article is not "made in imitation" until the process is finished. If, therefore, it is an article made from grapes grown in the United States, it cannot be any the less an article made from such grapes because the process of making it into an article in imitation of sparkling wine was performed upon it after it was in a condition to be already called an article made from grapes grown in the United States, though not yet in a condition to be called an imitation of sparkling wine. The word used in both instances is "made." I understand the information in this case to aver that the claimant took an article which was properly nothing but a wine made from grapes grown in the United States, and was not otherwise a liquor or compound, and was a completely fermented juice of such grapes, and was nothing else, and that he did nothing to it but directly inject into it carbonic acid gas by a wholly mechanical process; and I cannot come to any other conclusion than that, within the words of the clause in

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question, the product, when made, by such process, to be an imitation of sparkling wine, must be regarded as made from grapes grown in the United States.

The section in question evinces a clear design to relieve from taxation certain articles made from grapes grown in the United States, and to impose a tax on certain articles not made from grapes grown in the United States. All that is intended now to be decided is, that the article described in the information, as above understood, is not taxable. The article is not understood to be a compound, otherwise than as it is a compound of a wine which is the completely fermented juice of the grape, with carbonic acid gas. What other compounds, known as wine, and made in imitation of sparkling wine, could be considered as made from grapes grown in the United States, and so not taxable, it will be sufficient to decide, as the cases arise.

There must be judgment for the claimant on the demurrer, with leave to the informants to amend their information.

Thomas Simons (Assistant District Attorney), for the United States.

Edwards Pierrepont, for the claimant.

 MAY, 1873.

ALBERT SMITH, ASSIGNEE, &C., v. DAVID CRAWFORD, JR., IMPLEADED, &C.

BANKRUPTCY.—LIMITATION OF SUITS.—ADVERSE INTEREST.—CASES CRITICISED.

An action at law was brought by an assignee in bankruptcy, to recover a debt due to the bankrupt before the adjudication. The petition in bankruptcy was filed December 31st, 1868, and the plaintiff was appointed assignee April 1st,

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1869. The debt accrued February 5th, 1867. The defendant pleaded specially, "that the cause of action did not become vested in or accrue to the plaintiff at any time within two years next before the commencement of the suit." The plaintiff demurred to the plea:

Held, That the limitation of two years, prescribed in the second section of the bankruptcy Act, did not apply to such actions as the present, and that there must be judgment for the plaintiff on the demurrer.

The cases of *Mitchell v. Great Works Milling, &c., Co.* (2 *Story*, 648), and *Pritchard v. Chandler* (2 *Wright C. C. R.* 488), criticised.

Sedgwick v. Casey (4 *Benedict*, 562), maintained.

BLATCHFORD, J. This is an action at law to recover an alleged debt due to the bankrupts before their adjudication. The petition was a voluntary one, filed in this Court, December 31st, 1868. The plaintiff was appointed assignee April 1st, 1869. The indebtedness set forth in the declaration is alleged therein to have accrued on the 5th of February, 1867. The declaration is on the money counts, and an account stated. The defendant pleads the general issue, and also a special plea, that the "supposed causes of action in the said declaration mentioned, touching the rights of property of Merrick G. Reade and Charles D. Chase, the bankrupts aforesaid," did not "become vested in, or accrue, to the said plaintiff at any time within two years next before the commencement of this suit." The plaintiff demurs generally to the special plea, and the defendant joins in demurrer.

The only question presented on this demurrer is the same one adjudged by this Court in *Sedgwick v. Casey* (4 *Benedict*, 562). But this Court is pressed to review and reverse the decision then made.

The plea demurred to is sought to be maintained under the 2d section of the bankruptcy Act, which provides, that the several Circuit Courts of the United States, within and for the Districts where the proceedings in bankruptcy are pending, shall "have concurrent jurisdiction with the District Courts of the same District, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any

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person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any Court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." It is contended that this suit is a suit at law against a person claiming an adverse interest touching a right of property of the bankrupts, which is vested in the plaintiff, as their assignee. The right of property is said to be the debt or claim which is sought to be enforced in this suit. It is said that the suit is one touching, and to enforce, that right of property, and that the defendant claims an adverse interest, because the plaintiff seeks to recover the debt out of some property which the defendant has and claims, and to which, by defending the suit, the defendant asserts an adverse interest, which interest will be divested, if such property shall be taken, as a result of the suit, to pay the plaintiff's claim.

In *Sedgwick v. Casey*, the view held was, that the 2d section does not apply to a suit merely to collect a debt or enforce payment of money due on a contract; that, to bring any suit by an assignee in bankruptcy within the section, it must be a suit wherein the plaintiff claims an interest adverse to the defendant in or touching some property, or right of property, of the bankrupt, transferable to or vested in, the plaintiff, as assignee, or one wherein the defendant claims an interest adverse to the plaintiff, as assignee, in or touching some such property, or right of property; that, in the case then before the Court, the defendant claimed no ownership of, or title to, the debt or contract which the plaintiff was seeking to enforce against the defendant, nor did the plaintiff

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claim any ownership of, or title to, any specific property, or right of property, as having passed to him by virtue of his appointment, which the defendant also claimed to own, nor did the defendant claim any ownership of, or title to, any specific property which belonged to the bankrupts; that the limitation of two years applies only to such controversies; that, besides, it applies to controversies of which, by the same 2d section, the Circuit Court of the District has concurrent jurisdiction with the District Court of the same District; and that the Circuit Court of this District would have no jurisdiction of the suit then before the Court.

The construction I so placed upon the language of the 2d section was, that one of the two adversary parties to the suit must claim an adverse interest, that is, an interest adverse to the other party, respecting some property, or right of property, of the bankrupt, transferable to, or vested in, the assignee, and that the suit must be one involving such claim of adverse interest. I could not and cannot regard a mere debtor to the bankrupt as a claimant of an adverse interest, within the section, if sued by the assignee, to recover such debt. True, the suit is, in one sense, a suit touching a right of property of the bankrupt, vested in the assignee; because, the debt was a right of property of the bankrupt, and it is vested in the assignee, and the suit is founded on it. True, also, the defendant is an adverse party in the suit. But he does not claim an adverse interest touching, that is, in or respecting, the debt claimed, in the sense of the section. He does not claim an adverse interest in anything which, by the suit, the assignee claims and seeks to enforce an interest in. The assignee cannot claim to be vested, by the bankruptcy proceedings, with any interest in such property of the debtor as may be taken to pay the debt. Any interest which he could possibly acquire in such property would not be an interest passing, or transferable, or vested, by the as-

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signment in bankruptcy, but would be an interest resulting solely from a judgment in his favor as plaintiff in the suit. Nor does the defendant claim to own, or have any interest in, or title to, the debt sued on.

If the construction contended for by the defendant were to prevail, the language of the 2d section would cover all suits that an assignee, as such, could bring or that could be brought against him, as such assignee. For, as the assignee has, as such, no property or right of property that does not come from the bankrupt, and as the party opposed to the assignee, in the suit, and the assignee, are adverse parties to each other, in the suit, the description would cover all such suits. Of all such suits the Circuit Court would, by the section, have concurrent jurisdiction with the District Court. On such view, all that is said, in the section, about adverse interest touching the property and rights of property mentioned, might as well have been omitted, and the jurisdiction have been given, concisely, of all suits by or against the assignee, touching the property and rights of property mentioned.

Jurisdiction is expressly given to the District Court, by the 1st section of the Act, to collect all the assets of the bankrupt. This suit is simply a suit to collect an asset of the bankrupts, without being a suit to recover anything as transferred in violation of the 35th or 39th section of the Act, under the right of action given by those sections, and in which the transferee claims an adverse interest, and without being a suit to recover anything else in which an adverse interest is claimed. Therefore, the jurisdiction of this Court over the subject-matter of this suit needs no support, and can receive none, from any section of the Act except the 1st section. A suit brought under the jurisdiction conferred on the Circuit Courts by the 2d section, may be a suit to collect an asset of the bankrupt. A suit brought under the right of action given by the 35th and 39th sec-

tions may result in collecting an asset of the bankrupt. But, it has been held by the Supreme Court (*Smith v. Mason*, 14 *Wallace*, 419), that the enumeration, in the 1st section, of the controversies to which the general jurisdiction of the District Court extends, and which enumeration includes "the collection of all the assets of the bankrupt," does not include the suits mentioned in the 2d section; and that a suit by an assignee in bankruptcy, to divest a person of an interest claimed by such person in a fund transferred by the bankrupt before the adjudication of bankruptcy, must be brought under the 2d section, in a plenary way, and not under the 1st section, as a summary proceeding, although the thing sued on is, necessarily, an asset of the bankrupt.

It is contended, for the defendant, that, whatever view may be taken of the clause, in the 2d section, conferring jurisdiction on the Circuit Courts over the suits specified therein, the clause in regard to the limitation is so broad as to cover the present suit. The provision is, that "no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any Court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." It is contended, that this is a plain provision, that no suit shall be maintainable by or against the assignee, touching the property and rights of property of the bankrupt, transferable to, or vested in, the assignee, unless it is brought within two years from the time the cause of action accrued for or against the assignee; and that this suit is one touching, and founded on, such a right of property. But this view allows no meaning to the words, "or by or against any person claiming an adverse interest." In order to give any meaning to those words, it must be held that the limitation prescribed refers only to the kind of suits

mentioned in the previous part of the same section. The two parts of the sentence are separated by a semicolon. The granting of jurisdiction to certain Circuit Courts, in such suits, precedes, in the sentence. Then follows the semicolon. Then follows the word "but," as introducing a restriction on the exercise of jurisdiction, in such description of suits, by any Courts, by a limitation thereof, as to time. The limitation must, it seems to me, to give effect to all its language, be held to mean the same as if it read, that "no suit at law or in equity shall, in any case, be maintainable by such assignee, against any person claiming an adverse interest, touching the property and rights of property aforesaid, or by any person claiming an adverse interest, touching the property and rights of property aforesaid, against such assignee, in any Court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee."

The case principally relied on to sustain the view urged on the part of the defendant, as to the construction of the clause of the 2d section in regard to the jurisdiction of suits, is that of *Mitchell v. Great Works Milling & Mfg. Co.* (2 *Story*, 648), which arose under the bankruptcy Act of August 19th, 1841 (5 *U. S. Stat. at Large*, 440). The 8th section of that Act contained this provision: "The Circuit Court within and for the District where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same District, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights

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of property aforesaid, in any Court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued." The language of this section is, to all intents, the same as that found, as before quoted, in the 2d section of the present Act. There is some difference in punctuation, as seen in the two citations, but none to affect the question involved. The suit, in the case cited, was a bill in equity, brought in the Circuit Court for the District of Maine, by an assignee in bankruptcy, to obtain an accounting by the defendants in respect of an agency of the bankrupts for them, and the payment of a sum which, it was alleged, would be found due on such accounting. The bill was demurred to. One of the objections taken was, that the Circuit Court had no jurisdiction of the case. The Court (Mr. Justice Story) proceeds, first, to consider the question of the jurisdiction of the District Court over such a case, and holds that it finds such jurisdiction conferred on the District Court by the 6th section of the bankruptcy Act of 1841, in its provision, that the "jurisdiction in all matters and proceedings in bankruptcy," arising under the Act, "to be exercised summarily, in the nature of summary proceedings in equity," conferred on the District Court, "shall extend to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." This clause it holds "to include the jurisdiction to entertain suits to adjust all adverse claims, and to collect all outstanding debts." It further holds, that the Circuit Court, under the 8th section of the Act, was given jurisdiction of the case. The view taken is, that "a debt claimed by, and due to, the bankrupt, from any person, is a right of property in the bankrupt," assignable under the Act, and snable by the assignee; that the debtor, in every such case, is, neces-

sarily, in the sense of the Act, an adverse party, because he does not pay the debt, and resists its payment, on suit brought, and that the statement in the 8th section, that the jurisdiction therein given to the Circuit Court is a concurrent jurisdiction with the District Court, shows that the District Court has, by the 6th section, jurisdiction of such a suit. This reasoning is, to my mind, entirely unsatisfactory, and on the grounds before stated. The statute does not say that the Circuit Court shall have jurisdiction of every suit to which the assignee is a party, and wherein he is an adverse party to the other party, touching the property or rights of property mentioned. The fact of bringing the suit, makes the party bringing the suit against the assignee, and the party against whom the assignee brings the suit, a party adverse to the assignee, in the suit. The statute does not speak of "an adverse party." It speaks of a person claiming an interest adverse to the assignee, touching the property or rights of property referred to.

In *Pritchard v. Chandler* (2 *Curtis' C. C. R.* 488), Mr. Justice Curtis follows such decision of Judge Story, and holds that, "a suit by an assignee, to recover a debt due to the bankrupt, is," under the 8th section of the Act of 1841, "a suit against a person claiming an adverse interest touching a right of property of the bankrupt, within the meaning of that section of the Act, and that such a suit is, therefore, within the jurisdiction" of the Circuit Court.

The case of *McLean v. The Lafayette Bank* (3 *McLean*, 185), did not involve the question, for that was a suit to set aside certain alleged liens on the property of the bankrupts, as created in fraud of the bankruptcy Act.

Opposed to the construction put by Mr. Justice Story and Mr. Justice Curtis, on the 8th section of the Act of 1841, is the language of Mr. Justice Nelson, in *In re Conant* (5 *Blatchf. C. C. R.* 54), where he says, that the

limitation in that section "applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment."

Under the present bankruptcy Act, the uniform current of decisions has been in accordance with the views of this Court in *Sedgwick v. Casey*, no case being cited which holds a different view.

In *Woods v. Forsyth* (2 *Western Jurist*, 348), the Circuit Court for the District of Missouri (Judges Treat and Krekel) held that it had not "concurrent original jurisdiction given it by the bankrupt Act, for the collection of the debts due the bankrupt and the settlement of his estate;" that the concurrent jurisdiction conferred by the 2d section of the Act "is confined to cases in which there is a disputed title or claim to property, to suits in which some title or claim to the property or assets, adverse to that of the assignee, is set up;" and that the Court had no jurisdiction of the suit before it, which was a suit by an assignee in bankruptcy to collect a debt due by the defendant to the bankrupt prior to the bankruptcy.

In *In re Krogman* (5 *Nat'l Bkcy. Reg.* 16), the District Court for the Eastern District of Michigan (Judge Longyear) concurred with the views of this Court in *Sedgwick v. Casey*.

In *Davis v. Anderson* (6 *Id.* 145, 158), in the District Court for the Eastern District of Missouri, Judge Treat states his view to be, that the limitation in the 2d section of the Act "is to be confined to controversies about property rights, or legal and equitable titles to property."

In *Goodall v. Tuttle* (7 *Id.* 193, 196), which was a suit in the District Court for the Western District of Wisconsin, brought by an assignee in bankruptcy to collect a debt claimed to be owing by the defendant to the bank-

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rupt at the time of the commencement of the bankruptcy proceedings, Judge Hopkins says, that the 2d section of the Act does not clothe the Circuit Court with jurisdiction of such a case.

The case of *Bachman v. Packard* (7 *Id.* 353) is a case precisely like the one at bar. The plaintiff, as assignee in bankruptcy, brought suit in the Circuit Court for Oregon, to recover the amount due on a promissory note made by the defendant to the bankrupt before the bankruptcy. There was a demurrer to the complaint, assigning for cause that the Court had not jurisdiction of the subject of the action. The opinion of the Court (Deady, J.) is very full, on the question, and holds the same views which I have maintained in the present case. It cites the decision of Judge Story under the Act of 1841, and examines it, and dissents from it, and sustains the demurrer.

There must, therefore, be judgment for the plaintiff, on his demurrer to the special plea.

F. R. Coudert, for the plaintiff.

F. F. Marbury and *C. M. Da Costa*, for the defendant.

MAY, 1873.

IN THE MATTER OF LOUIS H. ROSEY, A
BANKRUPT.

INTERNAL REVENUE.—PENALTY.—PRIORITY OF DEBT TO UNITED
STATES.

Where a statute of the United States gives a penalty, and no particular remedy is prescribed for enforcing it, an action of debt may be brought to recover it, and the debt arises when the penalty is incurred.

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R. filed a voluntary petition in bankruptcy on August 14th, 1871, and was on that day adjudged a bankrupt. On October 8d, 1871, the United States brought a suit against him to recover penalties for alleged violations by him of the internal revenue laws, in selling, in April, 1871, cigar lights in packages without tax stamps, contrary to the 165th and 169th sections of the Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 296, 302), as amended by the 8th section of the Act of July 13th, 1866 (14 *Id.* 144). The bankrupt appeared in the suit, but put in no defence, and on February 2d, 1872, the United States recovered a judgment against him for \$5,081 68. Afterwards a proof of debt was filed on behalf of the United States, in the bankruptcy proceedings, founded on the judgment, and the United States claimed to be paid in full, by priority, under the 28th section of the bankruptcy Act. The assignee applied to the register for a re-examination of the claim, and testimony was taken, and the register certified to the Court the question whether the claim was a valid and provable claim, and whether it was entitled to a priority of payment:

Held, That the bankrupt had incurred the penalties in April, 1871, when the cigar lights were sold without the stamps;

That the claim was a provable debt, for so much of the judgment as did not consist of costs of the suit, and that for that amount the United States was entitled to a priority of payment.

BLATCHFORD, J. The petition in this case, a voluntary one, was filed on the 14th of August, 1871. The adjudication was made on the same day. The assignee was chosen on the 18th of September, 1871, and an assignment was executed to him on the 23d of September, 1871. On the 4th of October, 1871, the United States brought a suit against the bankrupt, in the Circuit Court for this District, to recover from him sundry penalties for violations of the provisions of sections 165 and 169 of the internal revenue Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 296, 297, 302), as amended by the 8th section of the Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 144, 145). The assignee was not a party to such suit. The bankrupt appeared in it, but filed no plea, and a judgment by default was entered against him, on the 2d of February, 1872, for \$5,081 68. After the recovery of such judgment, the United States filed in this matter a proof of debt against the estate of the bankrupt, founded on and for the amount of said judgment. On presenting this proof of debt, the United

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States claimed not only that the amount of it was a provable debt, but that it was entitled to a preference or priority in dividend, under the 28th section of the Act, after the payment of the fees, costs and expenses mentioned in that section. The assignee controverted both of these propositions. Thereupon, the assignee, under the 34th General Order, applied to the register for a re-examination of the claim, and testimony was taken thereon. The testimony is addressed to the question, whether the bankrupt incurred the penalties in question in April, 1871, to an amount equal to the amount of such judgment. The register has certified to the Court, for determination, the issue as to whether the claim of the United States is a valid and provable claim, and, if it is, whether it is entitled to preference or priority.

The question involved turns on the point, whether the claim was a debt provable against the bankrupt at the time of the adjudication.

The 165th section of the Act referred to provides, that, if any person shall make, prepare and sell, or remove for consumption or sale, lucifer or friction matches, cigar lights or wax tapers, upon which a duty or tax is imposed by law, as enumerated and mentioned in Schedule C, of the Act, without affixing thereto an adhesive stamp or label denoting the tax, he shall "incur a penalty of fifty dollars for every omission to affix such stamp." Section 169 provides, that any person who shall offer or expose for sale any of the articles named in Schedule C, or in any amendments thereto, shall be deemed the manufacturer thereof, and subject to all the duties, liabilities and penalties imposed by law, in regard to the sale of domestic articles without the use of the proper stamp or stamps denoting the tax paid thereon. Schedule C imposes a duty or tax of one cent, for each parcel or package, on friction matches or lucifer matches, or other articles made in part of wood, and used for like purposes, in parcels or packages containing one hundred

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matches or less. It also, as amended, imposes on wax tapers a tax of double the rates imposed on friction or lucifer matches; and on cigar lights, made in part of wood, wax, glass, paper, or other materials, in parcels or packages containing twenty-five lights or less in each parcel or package, one cent, and when in parcels or packages containing more than twenty-five and not more than fifty lights, two cents, and for every additional twenty-five lights, or fractional part of that number, one cent additional. The testimony shows that the bankrupt, in April, 1871, in the city of New York, sold 125 grosses of packages or boxes of matches, which were wax tapers or cigar lights, and had not upon them any tax stamps. Each box contained about 25 matches. There were 18,000 boxes. The penalty of \$50 for each box unstamped would make an aggregate of \$900,000 of penalty.

It is a well settled principle, that, in all cases where a forfeiture of property to the United States, as a penalty for a violation of law, is made absolute by statute, without giving any alternative remedy, such as a forfeiture of property or its value, and without prescribing any substitute for the forfeiture, or allowing any exception to its enforcement, or employing any language showing a different intent, the forfeiture becomes absolute at the commission of the prohibited act, and the title to the property vests from that moment in the United States, and a subsequent decree condemning the property as forfeited, relates back to the time of the commission of the prohibited act, and takes date from such time, and not from the date of the decree (*Gelston v. Hoyt*, 3 *Wheaton*, 246, 311; *Caldwell v. United States*, 8 *Howard*, 366, 381; *Henderson's Spirits*, 14 *Wallace*, 44, 56, 57).

The 179th section of the Act of 1864, as amended by the 8th section of the Act of 1866 (14 *U. S. Stat. at Large*, 145), provides, that the penalties incurred under the Act may be sued for and recovered in the name of

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the United States, in any proper form of action, or by any appropriate form of proceeding, before any Circuit or District Court of the United States, for the District within which said penalty may have been incurred, or before any Court of competent jurisdiction. It is well settled, that, where a statute gives a penalty, and no particular remedy is prescribed for enforcing it, an action of debt may be brought to recover it (*United States v. Colt, Peters' C. C. R.* 145, 154; *United States v. Lyman, 1 Mason*, 482, 498; *United States v. Bougher, 6 McLean*, 277, 281; *Stockwell v. United States, 14 Wallace*, 531, 541, 542). When the penalty is incurred, by the commission of the act prohibited by the statute, the penalty accrues to the Government thereby, and a debt to the Government arises. In the present case, the amount of the debt was fixed and made certain by the statute. Where a statute creates a charge or duty on an importer of goods to pay the duties upon them immediately on the importation, a debt is created to the Government, for which an action of debt lies (*United States v. Lyman, 1 Mason*, 482, 499; *Meredith v. United States, 13 Peters*, 486, 493). So, in the present case, the sale of the matches without stamps created a charge or duty on the bankrupt immediately to pay the penalty, and it became a debt, within the sense of the bankruptcy Act.

Under the 5th section of the Act of March 3d, 1797 (1 *U. S. Stat. at Large*, 515), which provides, that, when any person becoming indebted to the United States becomes insolvent, the debt due to the United States shall be first satisfied, it has been held that such priority of the United States attaches to all debts, equitable as well as legal (*Howe v. Sheppard, 2 Sumner*, 133, 142); and to debts created and owing, although payable only *in futuro* (*United States v. State Bank of North Carolina, 6 Peters*, 29, 36, 37).

I am of opinion that the United States is entitled to prove a debt in respect to so much of the amount of its

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claim set forth in its proof of debt as does not consist of any costs of the suit, and to a priority or preference therefor. I adhere to the view taken by me in *In re Brown* (5 *Benedict*, 1), that the claim is provable as a debt existing at the time of the adjudication, although a judgment on it was recovered after the adjudication.

Roger M. Sherman (Assistant District Attorney), for the United States.

James K. Hill, for the assignee.

MAY, 1873.

THE STEAMSHIP CIRCASSIAN.

MARSHAL'S COSTS.—CUSTODY FEES.—PROPERTY HELD UNDER SEVERAL PROCESSES.

Where the marshal holds property under several processes in admiralty, the proper rule, as to the *per diem* custody fee, is to divide it equally, for each day, among the cases wherein the vessel was held by process in force on that day, saving to the marshal, in case any party fails to pay his proper proportion, a remedy therefor against the other parties.

No compensation for custody of property held by the marshal under process, in admiralty, can be made to him, beyond \$2.50 per day.

BLATCHFORD, J. The vessel being in the custody of the marshal on process in each one of several cases, the question is presented, whether the entire custody fees are to be charged in the suit wherein the process was first served. I think the proper rule is that laid down by Judge Sprague, in the case of *The John Walls, Jr.* (1 *Sprague*, 178). In that case, the vessel was in the custody of the marshal on a previous libel, when the

second suit was instituted, and it had been the practice of the marshal, where he held property by virtue of two warrants of arrest, to charge the whole custody fees in the first suit; but the Court directed that they should be apportioned equally, charging one-half to each suit. The proper rule in the present cases is to divide the *per diem* custody fee, for each day, equally among the cases wherein the vessel was held by process in force on such day, saving to the marshal, in case any party fails to pay his proper proportion, a remedy therefor against the other parties.

As to an allowance to the marshal for keeping the personal property attached in these cases, as a compensation beyond the sum of \$2.50 per day, as the necessary expenses of keeping the property attached, I do not think the Court has any power to make such allowance. These suits are civil suits, *in rem*, in admiralty, against a vessel. The Act of February 26th, 1853 (10 *U. S. Stat. at Large*, 161), provides, that no other compensation to marshals than that prescribed by said Act shall be taxed and allowed, and that the compensation prescribed by said Act shall be taxed and allowed. Under the head of "marshal's fees," the Act says: "For service of any warrant, attachment, summons, *capias*, or other writ (except execution, *venire*, or a summons or *subpœna* for a witness), two dollars for each person on whom such service may be made, provided, that, on petition, setting forth the facts on oath, the Court may allow such fair compensation for the keeping of personal property attached and held on *mesne* process, as shall, on examination, be found to be reasonable." But, subsequently in the Act, there are provisions covering compensation for the sale of property under process in admiralty, in the nature of commissions on the proceeds, and the fee for serving process in admiralty, and the expense of keeping property attached in admiralty, and commissions to the marshal in case of a settlement by the

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parties of a claim in admiralty without a sale of the property attached. Among the provisions is this one: "For serving an attachment *in rem*, or a libel in admiralty, two dollars; and the necessary expense of keeping boats, vessels, or other property, attached or libelled in admiralty, not exceeding two dollars and fifty cents per day." This covers the entire subject of the expense of keeping property attached or libelled in admiralty. Only the necessary expense can be allowed, but the amount can never exceed \$2.50 per day. The clause in regard to the allowance of a fair compensation, by the Court, on petition, for the keeping of personal property attached and held on mesne process, refers to property other than that attached or libelled in admiralty. The word "compensation" means the same thing, in the Act, as fees or expenses; and, when the expenses of keeping property are limited, that is, within the meaning of the Act, a limitation on the "compensation" of the marshal in respect of such keeping. The Act authorizes the bill of "fees" of the marshal to be taxed and included in the judgment or decree against the losing party; and it forbids the marshal from receiving any other or greater "compensation," for any services rendered by him, than is provided in the Act, and repeals all Acts allowing to him any other or greater "fees" than those allowed in the Act. It may be that the limitation in respect to the expense of keeping property attached in admiralty is, at present, fixed at too low a rate, for this port; but the remedy is with Congress. Since the Act of 1853 was passed, there has never been, so far as I am informed, any allowance made, in this District, or in any other District, for the expenses of keeping property attached in admiralty, beyond \$2.50 per day.

H. E. Tremain, for the marshal.

C. Donohue, for the libellants.

In the Matter of Cosmore G. Bruce, a Bankrupt.

MAY, 1873.

IN THE MATTER OF COSMORE G. BRUCE, A
BANKRUPT.

PROOF OF DEBT.—RENT.—CONSIDERATION OF INDORSEMENT.—JUDG-
MENT SET ASIDE.

B., before he became bankrupt, hired premises, and afterwards sold out his business to his brother, and surrendered the premises to him, but still paid the rent, and afterwards directed the landlord to relet them, as he was not able to pay the rent, and agreed to be accountable for the rent till they were relet:

Held, That a proof of debt for the rent till the premises were relet was valid.

B. also agreed to furnish money to H., to take out a patent, and to pay the expense of taking it out, and received an interest in the patent. Thereafter a note made by H., and indorsed by B., was given to J., for work done as a chemist on the patent:

Held, That J. could prove the note as a valid claim against the estate of B.

A claim of debt was offered by the petitioning creditors against B.'s estate, founded upon a judgment. It appeared that, subsequent to the presentation of the proof of debt, the Court in which the judgment, which was entered on an inquest, was obtained, had opened the inquest and set aside the judgment:

Held, That the proof of debt must be expunged.

IN this case, the register certified to the Court that a claim which had been presented, for the rent of certain premises, was objected to by the bankrupt, on the ground that he did not rent the premises for the time claimed; that the facts were, that the bankrupt hired the premises on May 1, 1871, and about July 1, 1871, he sold out his business to his brother, and surrendered the premises to him, but paid the rent for August and September to the landlord's agent, and in December told the agent to relet the premises, and he would be accountable for the rent till they were relet, and they were not relet till March 1, 1872. The register gave his opinion that the bankrupt was liable for the rent up till March 1, 1872.

BLATCHFORD, J. I concur in the conclusion of the register.

The register also certified that a claim presented by Samuel H. Johnson as a creditor had been objected to by the bankrupt, as being founded on an indorsement of a note by the bankrupt, for which he received no consideration; that it appeared that a few days before the date of the note, Hogel, the maker of the note, and the bankrupt, made an agreement that the bankrupt should furnish said maker with money to take out a patent, and that the bankrupt was to pay the expense of taking it out; that the note, indorsed by the bankrupt, was given to Johnson for labor as a chemist upon the patent; that most of the work had been done before the making of the agreement; and that, under the agreement, the bankrupt received an interest in the patent, prior to the making of the note. The register certified that the claim was a legal one, and must be allowed.

BLATCHFORD, J. I concur in the conclusion of the register.

The register further certified that the bankrupt had objected to the proof of debt of the petitioning creditors, on the ground that the debt was founded on a judgment which had been set aside by the Court in which it was obtained, and that it appeared that the judgment in question, which had been entered on an inquest against the bankrupt, had been vacated by the Court, subsequent to the presentation of the proof of debt. The register gave his opinion that the creditors might be allowed to attach to their claim a statement of the items on which it was founded.

BLATCHFORD, J. As the proof of debt is on the judgment, and the judgment no longer exists, the proof of claim must be expunged.

Caruana v. The British and North American Royal Mail Steam Packet Co.

MAY, 1873.

**CARMELLO F. CARUANA v. THE BRITISH AND
NORTH AMERICAN ROYAL MAIL STEAM
PACKET COMPANY.**

**BILL OF LADING.—DELIVERY OF CARGO.—NOTICE TO CONSIGNEE WHEN
VESSEL IS NOT NAMED IN THE BILL OF LADING.**

A bill of lading was executed at Malta, on January 2, 1872, acknowledging the receipt there, in good condition, of eighty-five boxes of oranges for shipment to Liverpool, "to be there reshipped on board a Cunard steamer or steamers bound for New York, *via* Queenstown and (or) Boston," to be there delivered in like good order and well conditioned, on payment of certain freight. It also contained a clause that the goods were "to be taken from alongside by the consignee, immediately the vessel is ready to discharge," or they would be landed and deposited in a warehouse or sent to public store. On the 2d, 3d, or 5th of February, 1872, the consignee named in the bill of lading sent his agent with the bill of lading to the office of the Cunard Steamship Company in New York. He showed the bill of lading to the clerk having charge of the department of inward freight, and asked if the goods named in it had arrived. He was told that they would probably arrive by the *Russia*, which was to sail from Liverpool on February 3d, and that, on the arrival of any steamer, a list of the cargo and consignees of goods on board of her was published in the *Journal of Commerce*. The consignee inspected that list on the arrival of the *Russia*, and not finding his name, sent again to the office, and was told that the goods had not come by the *Russia*, but, if they were coming, would come by the next steamer. On the arrival of that steamer, his goods were not on her, and he sent again to the company's office, and was then told that the goods had arrived by the *China*, which came on the 1st of February. Her cargo list had been published on the 3d of February, and on the 5th of February the goods had been sent to the public store under a general order. Before the consignee learned these facts and applied for his goods, they had been sold to pay storage. The consignee filed a libel against the company to recover their value:

Held, That the publication of the cargo list of the *China* was not such a notice to the consignee as is requisite to discharge a ship owner from liability under a bill of lading:

That, under such a bill of lading as this, which mentioned no vessel, and on such inquiry as the consignee made, it was the duty of the ship owners to have seen to it that he was advised truly as to the arrival of his goods;

That the ship owners were therefore liable, on the bill of lading, for the value of the goods.

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BLATCHFORD, J. This suit is brought to recover the value of eighty-five boxes of oranges, shipped at Malta, under a bill of lading given by the respondents, the proprietors of a line of steamers running between Liverpool and New York, and known as the "Cunard Line," and consigned to the libellant, at New York. The bill of lading is dated at Malta, January 2d, 1872. It reads thus: "Received, in good order and condition, from Dr. L. Ullo, for shipment to Liverpool, to be there reshipped on board a Cunard steamer or steamers bound for New York, *via* Queenstown and [or] Boston, eighty-five boxes oranges, being marked and numbered as in the margin," eighty-five boxes, C. F. C., "and are to be delivered, in the like good order and well conditioned, at Jersey City, being within the jurisdiction of the custom house of the aforesaid port of New York, * * * unto C. F. Caruana, Esq., or to his assigns, freight for the said goods being paid on delivery, as per margin," £18 14 * * * "The goods to be taken from alongside by the consignee, immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in the warehouse provided for that purpose on the steamship wharf at Jersey City, or elsewhere, or sent to the public store, as the collector of the port of New York shall direct, and, when deposited in the warehouse, to be subject to storage, the collector for the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

The libel alleges the shipment of the goods under the bill of lading, and avers that they arrived in New York, but the respondents did not deliver them to the libellant, and they became wholly lost to him.

The answer avers that the goods were taken to Liverpool, and there shipped in a Cunard steamer for New York; that, by the usage of trade, notice of the arrival of goods and of readiness to discharge is given by pub-

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lication in a daily newspaper, notice of the day when the vessel will be ready to discharge being also posted in a conspicuous place in the New York custom house, of which usage the libellant had notice; that the notice of arrival of the goods and of readiness to discharge was duly given in the manner described, and thereupon it became the duty of the libellant to procure a permit for the delivery of the said goods, and to take them from alongside of the vessel when landed; that the goods were landed on the respondents' wharf at Jersey City; that the libellant was not ready to take them, and did not obtain a permit therefor, whereupon they were sent to the public store, under a general order granted by the collector of the port of New York; that, after deposit in the said warehouse, and in consequence of the libellant's neglect to take the same, as he was bound to do by the terms of his contract, the goods became liable to decay and were sold to pay storage, such sale being in conformity with the usage and custom of trade; and that the respondents are not responsible for the loss on the goods.

The name of the steamer by which the goods were to be sent from Liverpool to New York, is not given in the bill of lading, nor is the day on which they would leave Liverpool stated therein. The days of sailing of steamers of the Cunard line from Liverpool for New York, in January and February, 1872, were as follows: the *Java*, January 6th; the *Calabria*, January 13th; the *China*, January 20th; the *Abyssinia*, January 27th; the *Russia*, February 3d; and the *Algeria*, February 10th. The libellant had no information as to what steamer would bring the goods. On the 2d, 3d or 5th of February (the 4th falling on Sunday), the libellant's son and agent, on his behalf (no information that the goods had arrived having been received by the libellant), went to the office of the respondents, in New York, having the bill of lading with him, and placed it in the hands of a clerk of the

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respondents in such office, who had charge of the department of inward freight, and asked him if the goods named in it had arrived. The clerk inspected the bill of lading and informed the libellant's son, that the goods would probably arrive by the Russia, which was assigned to sail from Liverpool February 3d. He also then gave to the libellant's son a printed list, as above, of the names of the vessels and the days of their sailing from Liverpool, and informed him that a list of the names of the consignees, and of the number of packages consigned to them respectively, by the vessels of the line, was on their arrival, generally published in a daily newspaper published in New York, called the *Journal of Commerce*. The libellant was a subscriber to that paper. He watched for the arrival of the Russia, and, when she arrived, examined her cargo list as published in the *Journal of Commerce*, but it did not contain his goods. They did not come by the Russia. The libellant's son thereupon went to the respondents' office, and saw the same clerk, and asked him if the goods had arrived by the Russia, and was answered that they had not, and was also told by the same clerk, that, if they were coming at all, they would come by the Algeria. The libellant then watched for the arrival of the Algeria, and, when she arrived, examined her cargo list in the same newspaper, but did not find his goods in it. The libellant's son thereupon went to the office of the respondents, and was told by the same clerk, that the goods had not arrived by the Algeria, but had come by the China, which, he said, had arrived about the 3d of February. He demanded the goods, but they were not delivered to him. The China did bring the goods. She arrived on the 1st of February, and was entered at the custom house on the 2d. Her cargo list, containing a statement that she had arrived, and had brought 85 packages of merchandise for the libellant, was published in the *Journal of Commerce* on the morning of the 3d of February. The 85 boxes

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were sent to the public store, under a general order, after 10 o'clock, A. M., on the 5th of February, the libellant not having obtained any permit for them, or entered them at the custom house, because he did not know of their arrival.

At the time of the first visit of the libellant's son, the clerk had not seen a manifest of the China's cargo, even if such manifest was in the office. The latest manifest he had seen was that of the Java's cargo. The clerk acknowledges, in his testimony, that the reason he told the libellant's son that he thought the goods would arrive by the Russia was, that he did not think they would reach Liverpool in time to come by either the Calabria, the China or the Abyssinia. The manifests of the cargoes of the various steamers, as they arrived, were taken to, and kept in, the office of the respondents. They were there for reference. On the second visit of the libellant's son, after the arrival of the Russia, and which must have been after the 15th of February, and when the attention of the clerk was called to the goods a second time, the manifest of the China's cargo must have been in the office, showing that the libellant's goods came by her. Yet the clerk did not consult it, nor did he tell the libellant's son that the goods had come by the China. The publication of the cargo lists in the newspaper is not shown to be the act of the respondents, as a notice emanating from them in fulfilment of any duty to give a notice. The answer avers, that, by the usage of trade, notice of the arrival of goods and of readiness to discharge is given by publication in a daily newspaper, and that notice of the day when the vessel will be ready to discharge is also posted in a conspicuous place in the New York custom house, and that the libellant had notice of such usage, and that notice of the arrival of these goods and of readiness to discharge was duly given in the manner described. No such usage is proved. Nor is it shown that the respondents gave

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any such notice as is averred. Whatever notice the publication of the cargo list of the China was, it is not shown to have emanated from the respondents, nor was there any publication of any notice of readiness to discharge. The libellant had no knowledge or information as to the vessel which was to bring his goods. He sent his bill of lading in abundant season to the office of the respondents, and spread before them all the information he had, which was the date of the bill in Malta. It was their duty, under such a bill of lading, and on such inquiry as the libellant made, to have seen to it that he was advised truly as to his goods. Instead of that, the respondents misled him. They substantially told him that his goods could not arrive sooner than by the Russia, knowing as they did the date of their delivery in Malta. He could know nothing on that subject. They were bound to know everything. They, in effect, told him that his goods had not arrived by the China, when his son went there after the arrival of the Russia. He cannot be held responsible for not having examined the cargo list of the China, as published in the newspaper February 3d.

The provision in the bill of lading, that the consignee is to take the goods from alongside as soon as the vessel is ready to discharge, must have a sensible construction. What vessel? None is named in the bill of lading. It is to be "a Cunard steamer or steamers." The respondents could divide the shipment, and send it in parts, by several steamers. The steamer or steamers were to be "bound for New York *via* Queenstown and [or] Boston." The respondents could send the goods all by way of Boston, or could send some by way of Boston and some direct to New York, and could divide the goods among several steamers. If sent by way of Boston, their ultimate destination being the respondents' wharf at Jersey City, they must reach that wharf by a conveyance other than that in which they left Liverpool. Un-

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der such a contract, the consignee is entitled to a notice of the arrival of his goods, and is not obliged to watch for the arrival of a nameless vessel, or for the appearance on the wharf of goods which may come from Boston by one of many means of transport; and, if he does what this consignee did, he does all that is incumbent upon him to entitle himself to receive actual notice of the arrival of the goods, when they do arrive and their arrival is known to the carrier.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the amount of the damages sustained by the libellant.

Charles Donohue, for the libellant.

Daniel D. Lord, for the respondents.

Eastern District of New York.

MAY, 1873.

THE SCHOONER SYLVESTER HALE.

COLLISION IN LONG ISLAND SOUND.—SCHOONERS MEETING.—PORTING
HELM.

Two schooners came in collision in Long Island Sound in a clear night. They were sailing on meeting courses, not varying more than half a point from being exactly opposite courses. Both vessels had the wind free; neither made any change of course before the collision:

Held, That the case was one for the application of the 11th of the Rules for avoiding collisions. That both vessels were, therefore, bound to have ported their

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helms, and, as neither had done so, both vessels were in fault, and the damages must be apportioned.

Whether the 11th Rule is applicable to the case of two sailing vessels meeting end on or nearly so, one being close hauled and the other sailing free, *quere*.

BENEDICT, J. This action is brought to recover the value of the schooner *G. B. Murney*, a vessel owned and commanded by the libellant, John Murney, which was sunk on the night of the 20th of July, 1872, by colliding with the schooner *Sylvester Hale* in Long Island Sound.

The *Murney* was a canal schooner laden with coal, upon a voyage from Elizabethport, N. J., to Norwich, Connecticut. The *Hale* was a schooner bound from Taunton to Elizabethport light. The *Murney* was going four or five, the *Hale* six or seven miles an hour under a good sailing breeze. The night was clear and nearly as light as day.

The libel gives the course of the *Murney* as east northeast half east, with the wind due north, but claims that she was close hauled and held her course. It charges that the *Hale* was sailing free, and that, although bound to avoid the *Murney*, she did nothing, but held her course, and thereby ran into the *Murney*, striking her upon her lee bow and causing her to sink almost immediately.

The answer presents features calculated to attract attention. It states that the *Murney* was sailing free, and the *Hale* close hauled, but also states that the course of the *Hale* was due west, with the wind north north-west, which makes the *Hale* free. It states that the *Murney* appeared to those on the *Hale* to be bound to the eastward, and upon a course which would have carried her to the southward of the *Hale*; but the men on the *Hale* swear that the *Murney* was taken for a vessel bound to the westward—a statement not always adhered to however by the man at her wheel.

The answer also in unequivocal terms states a case of vessels not meeting end on or nearly so, while the

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argument addressed to me in behalf of the Hale was largely based upon the theory, that the vessels were so meeting. Finally the wrong movement charged upon the Murney in the answer is starboarding, but the movement is there so described, as to show that faulty navigation in allowing the vessels to get into such close proximity, and not any starboarding by the Murney, must have been the cause of the accident.

The testimony offered in support of these pleadings respectively abounds in inexplicable statements, and contradictions which it is vain to attempt to reconcile.

A prominent statement is that those on the deck of the Hale were keeping a good lookout, and saw the Murney at a distance to leeward. When the evidence of the two persons who were on the deck of the Hale, as to what they did on board their vessel, is examined, the fact appears that they kept no proper lookout, did not see the Murney until the instant of collision, and made no change in the helm of the Hale in time to alter her course before the vessels came in contact. This controlling fact is disclosed by the following evidence given by the witnesses for the Hale.

The mate was in charge of her deck, and the supposed lookout. He says that he saw a schooner approaching to windward, and at once went aft to the wheel, and inquired of Petersen, the man at the wheel, if he saw her; that when aft he looked at the compass, as was natural, and found the vessel to be sailing west by south, the course which had been given to the wheelsman. He mentions no change in the helm, as being then made, and he directed none; but, having looked at the compass, he started forward, and when he arrived at the mainmast stopped to give the winch two or three turns, just enough to taughen the topsail sheet. From the winch he moved towards the steps, to windward, and he had gone but a few feet when the vessels came in contact.

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All that was done on board the *Hale*, with reference to the *Murney*, transpired during the very short period of time which elapsed between the mate's leaving the wheel and the blow. Petersen, the man at the wheel, says that during this period he looked under his boom twice; that the mate had not reported, nor had he seen the *Murney* till he first looked under the boom, after the mate left him to go to the winch; that when he first looked, he saw the *Murney* two points off his bow, but did nothing; that the second time he looked she was still two points off his bow on the same course, but very near him, and that he at once ported his wheel. It is impossible that the *Murney* should have then been two points off his bow. His statement that, as he stood to leeward on his vessel to look under his boom, he saw the *Murney* through the parts of the fore-rigging, is more likely to be accurate, and places her nearly ahead and upon him, as the fact was.

I conclude, without difficulty, from this evidence, that the *Murney* was not seen from the *Hale*, until the instant before the collision, and when no action of the helm could effect any useful change of course.

While considering the testimony of the persons on the deck of the *Hale*, I may here remark that the mate says, that he saw and reported the *Murney* to the man at the wheel before he went to the winch, but the statement is contradicted by the statement of the latter and by the action of both; and that the man at the wheel says that he supposed the *Murney* to be going the same way the *Hale* was, but the statement is wholly inconsistent with other parts of his testimony and with his acts. These and other misstatements, which appear in the evidence of those responsible for the movements of the *Hale*, make it difficult to place great reliance upon any of their statements or conclusions.

Their own account of what they did contradicts their theory of the case, and shows them guilty of the great

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negligence of running in the night without keeping a proper lookout, and that they made no change of course to avoid the *Murney*.

Having thus ascertained the movements of the *Hale* with reference to the *Murney*, I turn to consider the movements of the *Murney*. Upon this point, the testimony of those on the *Hale* throws no light, for they did not see her till she was upon them. Those on the deck of the *Murney* say that they had a lookout, who saw the *Hale* for a long distance. In order to disprove this, evidence has been given tending to show that the man claiming to be the *Murney*'s lookout came on board the *Hale* in a condition, as to his dress, which indicates that he had been roused from his berth by the collision. Upon a careful examination of the testimony of the various witnesses on this point, the weight is found to favor the allegations of the *Murney* that she had a lookout and saw the *Hale* in time.

The actual management of the *Murney* is indeed more consistent with the idea that the *Murney* was being sailed without knowledge of the presence of the *Hale*, until the vessels were close together, than with any other; but it is also consistent with the theory that the *Hale* was seen and, under the supposition that she was more free than the *Murney*, it was judged that, if the *Murney* held her course, the *Hale* would feel forced to keep out of the way—a result which doubtless would have been attained if any one on the *Hale* had been looking at the approach of the *Murney*.

But whether the *Hale* was seen or not, there is no evidence of any change in the course of the *Murney* prior to the time when the vessels were close together and the collision inevitable.

It thus appearing that no changes occurred in the courses of the vessels calculated to cause the collision, next in order is to determine what the courses were upon which these vessels were thus sailing. As claimed by the

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respective crews, and as proved by the evidence, the course of the *Murney* was E. N. E. $\frac{1}{4}$ E., and that of the *Hale W.* by S.

Their divergence was, therefore, half a point. By holding these courses, the vessels came in contact, and it must, therefore, be found that the speed at which these vessels were going respectively was such that the courses they were upon involved risk of collision. The question then arises whether they were crossing, within the meaning of Rule 12 of the International Rules adopted by the United States in 1868, or meeting end on or nearly so, within the meaning of Rule 11.

This brings up for consideration the proper construction to be given to Rule 11 of the International Rules, a rule which has been often called in question, and, as it appears to me, greatly liable to be misapplied.

The practicability of this rule at all in the actual navigation of sailing ships has been, and still is, in some quarters doubted, and at its door have been laid many disastrous collisions, for "The reckless use of port-helm leads to collision."

Perhaps the better opinion now is, that the rule is practicable, provided its application be carefully restricted to the cases to which alone its terms make it applicable. As is well known, the rule originated in England, and stands there as a substitute for a rule differently worded, which was found to be impracticable, and, accordingly, was substantially destroyed by judicial decisions (*Lowndes' Law of Collision at Sea*, p. 22). As at first understood, the rule, in its present form, was greatly criticised, and was defended by claiming it to read as not applicable to ships which must, if both keep on their respective courses, pass clear of each other; but applicable, in the night time, only to cases in which each ship is in such a position as to see both the side lights of the other. This was the construction given by Mr. Thomas Gray, of the British Board of Trade, and it was

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approved, in England, by the Admiralty, Board of Trade, and Trinity House, and, in France, by the French Government.

By the Order in Council of July 30, 1868, it became part of the law in England. It was adopted as a supplement to the International Rules by the Assembly of the Senate, at Hamburg, Oct. 16, 1868. This interpretation was adopted by Russia, by order of the Emperor, Nov., 1868, and by Sweden, Dec. 12, 1868.

[See Appendix to "A few remarks respecting the rule of the road for steamships," by Thomas Gray, for the words of the order.]

The paramount importance of having international rules, which are intended to become part of the law of nations, understood alike by all maritime powers, is manifest; and the adoption of any reasonable construction of them, by the maritime powers named, affords sufficient ground for the adoption of a similar construction of our statute by the Courts of this country.

For this reason, and because the rule, so understood, will seldom come into play, and, therefore, affect but little the old maritime rules of the seas, which were followed for centuries before the rules, and which are, for the most part, still followed by seamen in the actual navigation of sailing ships, I so construe the rule. But, so understood, it is, nevertheless, applicable here, for the evidence shows the present to be what has been called "the exceptional case,"—the case "hardly determined by the rules," of two sailing vessels meeting, in such a position that each should have seen both the side lights of the other.

I do not overlook the testimony of those on the *Murney*, that only the green light of the *Hale* was seen by them, nor the claim of the *Hale* that only the red light of the *Murney* was visible to her.

But the observation of the *Murney* by those on the *Hale* was when danger was imminent, and is not reliable.

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And, on the other side, the Captain of the Murney, who was at her wheel, reconciles his statement that he saw only the green light of the Hale, with the mode in which the vessels were approaching, by the not improbable supposition that the red light of the Hale was hid by her jib. Other facts in the case, and, among them, the nature of the injury upon the starboard bow of the Hale, and the mode in which the blow was delivered, indicate that the vessels were meeting almost exactly end on, and such is the description of the collision as given by the libel.

At this stage of my examination of this case I am brought very near to a question respecting the application of Rule 11, of so much importance that, although not called on by the facts of this case to decide it, I do not feel at liberty to allow it to pass without allusion. That question is whether Rule 11 is to be considered as subject to the ancient and most universal law of the sea, that a vessel sailing free shall give way to a vessel sailing close-hauled. As worded, the rule contains no exception unless it may be found in the phrase, "so that each may pass on the port side of the other." These words seem to indicate that the rule is only applicable to vessels which have the wind alike, inasmuch as a vessel close-hauled upon the starboard tack, if she ports, will necessarily come into the wind and her way be stopped; therefore if she ports she cannot be said to pass the other at all. Instead of passing she makes herself a stationary object to be avoided by all approaching vessels. The provisions of Rules 19 and 20 may also be resorted to, as affording ground for the conclusion that a vessel sailing close-hauled is exempted from the obligation to port. Aside from the wording of the Rules, it has been urged that they must be so construed as to be reasonable, and that it is unreasonable to require a vessel to throw herself out of command, or to compel her to work her sails or to run off to leeward, to avoid a vessel which

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by a movement of her helm can go either way without loss of position.

This consideration was doubtless the ground of the decision of Dr. Lushington in the case of *The Halcyon* (1 *Lush.* 101), where, notwithstanding the statutory rules, a vessel sailing close-hauled upon the starboard tack was held not bound to port. Similar considerations would seem to have force in the case of a vessel close-hauled upon the port tack, for, although a vessel close-hauled on the port tack can port without losing her headway, she cannot do so without making distance to leeward which she must beat to windward to overcome. She can run off with ease, but she cannot regain her original line without tacking. If, without tacking, she resumes her course by the wind, she must do so upon a line parallel to, but to leeward of her original course, to her great disadvantage. The necessary result of porting by a vessel close-hauled upon the port tack is so disadvantageous that it has been said by good authority, that in all ordinary cases a vessel so situated will come into the wind and stop in preference to keeping off. (See "*The Law of the Port-helm,—An Examination into its History and Dangerous Action.*" By Commanders P. H. Colomb and H. W. Brent, H. B. M. Navy. Largely quoted in the collation made by Commodore Jenkins, U. S. Navy, and published by the Navy Department in 1819, page 164.) Furthermore, the sailing rules were supposed to be intended to make definite, but not to change, any of the sailing rules known and practiced by seamen everywhere; and it will be found, I think, that such has been the interpretation, in the particular now in question, which has been given to the rules by those whose peculiar business it is to apply them in actual navigation. If this should prove true, any attempt by the Courts to adopt a construction at war with the traditions of the sea, and not adapted to the necessities of sailing ships, would, as I fear, prove much worse than useless.

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These considerations affecting the construction of Rule 11 I have thought proper to state when examining the Rule, although I am not now called on to determine as to their validity, for the reason that upon the evidence in this case I deem it quite clear that neither of the vessels in question was close-hauled. As to the *Hale*, her own crew say she was sailing free. As to the *Murney*, her libel, and her master upon the stand, make her half a point free, if the wind was north, and his vessel only able to lie within six points, as he claims, but which is doubted. She was a point and a half free if the wind was N.N.W., as is claimed by the *Hale* to have been shown. But half a point would have enabled the *Murney* to port sufficiently to avoid the *Hale* and still regain her distance to windward, and removes from her any ground of exemption from the obligation to port. Both of these vessels were, therefore, bound to port as they approached each other, unless excused by some peculiar circumstance. This neither did. The libel of the *Murney* avers that she did not, and the answer avers that the *Hale* did not. For this omission the evidence furnishes no excuse. In the libel an excuse is suggested for the *Murney* that the actions of the *Hale* led the master of the *Murney* to suppose that the *Hale* was going to keep off, but there is nothing in the evidence to countenance the suggestion. The answer states, in excuse of the omission by the *Hale*, that a vessel was to windward of the *Murney*, and sailing so near to her course, that it was not safe or proper for the *Hale* to port. But the *Hale* had abundant time, after these schooners were in plain sight, to have gone to windward of both of them, and she could have done it easily by a movement in time. Nor were the approaching schooners so near together as to prevent her at a subsequent period from luffing sufficiently to clear the *Murney* and passing between them, without danger of collision with the windward schooner. In fact, the man at her wheel swears that he did luff half

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a point, but as already shown, all that this man did was done at the instant of collision, when it is doubtful if any movement of his wheel could have any effect upon his course, or did any more than to transfer the blow from the side of the Murney to her bow.

This case, restated then as I find it, is that of two vessels meeting in a clear night end on, both free and each able to port so as to avoid the other. The one bound to the westward runs into the bows of the other without attempting to avoid her, and in fact without seeing her at all, owing to the want of lookout. The one bound to the eastward, and equally bound to port, if she saw the other at all, made no change of course, gave no hail whatever, but held on until her bows were stove by the collision. Both without excuse neglected to obey Rule 11, which, if it had been obeyed by either, would have prevented the accident; and both vessels being in fault, the damages resulting must be apportioned.

Let a decree be entered accordingly.

For libellant, *Wilcox & Hobbs*.

For claimants, *Evarts, Southmayd & Choate*.

MAY, 1873.

THREE HUNDRED AND NINETY-THREE TONS
OF GUANO.

CHARTER PARTY.—DEMURRAGE.—MASTER'S REFUSAL TO SIGN BILLS
OF LADING.

The owners of a vessel filed a libel against a cargo of guano, which had been brought in her, from Surranoy Cay to New York, under a charter-party, to recover for demurrage in loading her and in discharging, and to recover passage

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money, agreed in the charter to be paid by the charterer. Detention of the vessel in loading beyond the specified time was admitted, but the charterer claimed that it was caused by the master of the vessel, in that he, without cause, when she was partly loaded, changed the place of anchorage of the vessel to a greater distance from the spot where her cargo of guano was being loaded. On the arrival of the vessel in New York, the master refused, for several days, to sign bills of lading for the cargo, because the charterer would not admit the claim for demurrage in loading. The charterer also refused to pay the passage money, on the ground that the fare was so bad as to constitute a breach of the contract:

Held, That, on the evidence, the master was entitled to the presumption that he knew best where his vessel should anchor, and that his moving of his vessel was not, therefore, a defence to the claim for demurrage in loading;

That the master was not justified in refusing to sign the bills of lading, and the owners could not, therefore, claim demurrage during the time of such refusal;

That, on the evidence, the fare was sufficient to entitle the owners to the passage money.

BENEDICT, J. The demand in this case is for a balance due to the owners of the bark *Nicaragua*, upon a charter of her for a voyage from New York to Surrano Cay and back. The balance claimed to be unpaid consists of three items. One item is for a balance of demurrage for detention while loading in Surrano Cay. A detention of four days, unpaid for, is not disputed; but it is insisted that this delay was caused by the wrongful acts of the master, in that, while the vessel was being loaded, he changed her place of anchorage, and, without cause, removed her a quarter of a mile further from the shore, whereby the loading of the guano, which composed the cargo, was retarded for four days.

I cannot find that this defence is supported by sufficient evidence. The master says that he changed his anchorage for the safety of his vessel. No particular place of anchorage was agreed upon in the charter-party; and it cannot be said, upon the proofs, that the vessel was at any time anchored at an unfit place, considering the nature of the harbor. There is no evidence that the object of the removal was to delay the loading,

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and the master is entitled to the presumption that he best knew where his vessel should anchor. The libellants must, therefore, be held entitled to the four days' demurrage in dispute for detention in Surrano Cay.

Another item of the libellants' demand arises out of a provision in the charter, that the charterer should go as passenger in the cabin, paying one dollar per day as long as he might be on board. To this the defence is, that the fare furnished to the charterer was so wretched and bad, as to constitute a breach of the contract to convey him as a cabin passenger. This defence also fails upon the proofs. The fare, doubtless, was not of the best, but one must not scrutinize too closely the bill of fare of a vessel freighting guano from the Carribean sea. Upon the evidence, I judge the fare to have been sufficient to entitle the libellant to the dollar a day which the charter-party provides for.

Another part of the libellants' claim arises out of delay in discharging the cargo in New York. It appears by the evidence, that the master refused, in Surrano Cay, to sign a bill of lading for the cargo on board, and again refused after the arrival of the vessel in New York, because the charterer refused to assent to the demurrage charged by the ship in Surrano Cay. Some days were lost in New York in the effort to adjust this claim for demurrage, and it was not until after the 19th of June, which was Saturday, that any bills of lading were delivered to the charterer. During this time it was impossible for the consignee to enter his cargo at the Custom House, and obtain a permit to discharge it, because he had been unable to procure a bill of lading. The claim of the master that the demurrage should be agreed to before the bill of lading was signed had no foundation in law. The master was bound to sign the bill of lading, without reference to his claim for demurrage, and so long as he wrongfully withheld from the consignee the bill of lading, which was necessary to enable him to

The Schooner *Helen J. Holway*.—The Schooner *Enoch Moore*.

enter the cargo, and to obtain a permit to discharge it, the discharge was prevented by the master of the ship, and for that delay he cannot hold the charterer liable. Monday, the 21st of October, was the first day that the consignee could obtain his permit, owing to the refusal of the master to deliver the bills of lading; and from that time his obligation to receive the cargo must date.

According to this view, the libellants are only entitled to five days' demurrage in New York, instead of the twelve days which they sue for.

The libellants are, therefore, entitled to receive \$160 for four days' detention in Surrano Cay, \$200 for five days' detention in New York, \$141 from Mr. Wachschlager, passenger; and he is also entitled to \$16 for moving the vessel, and \$10 paid for towage, making in all \$527.

Let a decree be entered for this amount.

For libellants, *Beebe, Donohue & Cooke*.

For claimant, *Kobbe & Fowler*.

Southern District of New York.

JUNE, 1873.

THE SCHOONER HELEN J. HOLWAY.—THE SCHOONER ENOCH MOORE.

COLLISION IN CHESAPEAKE BAY.—SAILING VESSELS CROSSING.—
EVIDENCE.—PLEADING.

Two schooners, the *H.* and the *M.*, came in collision at night in Chesapeake Bay. The *M.* alleged that the wind was east-northeast and she was sailing south; that she saw both lights of the *H.* a little to windward of her course, coming

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up the bay, heading north, and close-hauled; that the M. ported, but the H., instead of keeping her course, as she was bound to do, starboarded and caused the collision. The H. alleged that the wind was north-northeast, and that she was heading northwest by north half north, close-hauled, and that the M. was coming down about south, on a course which would have carried her astern of the H., but she ported and caused the collision, and that the H. kept her course, as she was bound to do, till the collision was inevitable, when she ported, in order to ease the blow:

Held, That the evidence from the H., that she was close-hauled, and as to her course by compass, was more reliable than that of the M., which was sailing free in any event;

That the M. mistook the course of the H.;

That the courses of the vessels were crossing, and the case fell under the 12th and 18th Rules, and the M. was bound to keep out of the way, and the H. was bound to keep her course;

That, on the pleadings, the M. could not claim that the H. was in fault for not porting;

That the M. was responsible for the collision;

Whether, if the vessels had been meeting end on, or nearly so, the case would have been one requiring the H. to port her helm, *quære*.

BLATCHFORD, J. These are cross suits growing out of a collision which took place between the schooner Helen J. Holway and the schooner Enoch Moore, in the Chesapeake Bay, on the morning of the 10th of September, 1871, about half past four o'clock. The Moore was a vessel of 313 tons, and was deeply laden with coal, and was on a voyage from Georgetown, D. C., to the city of New York. The Holway was a vessel of 223 tons, and was not as deeply laden as the Moore, and was on a voyage from Boston, Massachusetts, to Georgetown, D. C. Both vessels were injured by the collision.

The libel of the Moore, which was filed on the 9th of October, 1871, alleges, that there was a fresh breeze from the east-northeast; that the course of the Moore was south, by the compass; that she had the wind free; that the atmosphere was clear; that, at about twenty minutes past four o'clock, A.M., a seaman on the lookout on the Moore, on her top-gallant fore-castle, and the master of the Moore, who was walking on her port quarter-deck and was in charge of the deck, made the two colored

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lights of the Holway ahead, and a little to the windward of the course of the Moore, and between one and two miles off, the Holway heading up the bay, north, having about six points in which to make her course, and being otherwise close-hauled; that the master of the Moore, seeing that the Holway was sailing close-hauled, immediately gave the order to the helmsman of the Moore to port his helm, which was done, and the Moore swung off, and kept swinging off, on a hard a-port helm, until her foresail becalmed, which would be on a course west-southwest; that, in a few minutes, the Holway, instead of keeping her course, as she was bound to do, she being close-hauled, and when, if she had kept her course, no collision would have occurred, starboarded her helm, and kept hard away, and let her main sheet run off, and ran head on, or nearly so, into the Moore, at the port fore chains of the Moore, the Holway, at the time of the collision, heading about west; and that the collision was the result of negligence in the Holway, in not having a proper lookout forward, and in improperly starboarding her helm and letting her main sheet go, and in not having kept on her original course, as she was bound to do, she being close-hauled at the time, and in not being properly manned, her officers and master being below and asleep, and an incompetent mariner being in charge of her helm.

The answer of the Holway, which was filed on the 4th of June, 1872, avers, that, before and at the time of the collision, the Holway was beating up the bay against a strong breeze from the north-northeast, being before, and at the time of, the collision, close-hauled, on her starboard tack, heading about northwest by north half north, as near the wind as she would lie, and moving steadily along at the rate of four or five knots an hour; that, some time before the collision, the master and crew of the Holway discovered the Moore coming down the bay, under full sail, free, on her port tack, and with ample

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room to pass the *Holway* at a long distance on either hand, but nearing the *Holway*, and moving with great speed, heading about south, and across the track of the *Holway*, and on a course which, if steadily kept, would have carried her free and clear and astern of the *Holway*; that, when within about a ship's length of the *Holway*, and about three points off the *Holway's* starboard bow, the *Moore* suddenly ported her helm and kept away, and ran across the bows, and afoul, of the *Holway*; that, up to the instant of the collision, the *Holway* was close-hauled, on her starboard tack, keeping steadily her course by the wind, as she was bound to do; that, at the moment of the collision, when it was inevitable, she ported, to ease the blow; and that the collision was occasioned by the negligence of the *Moore*.

The libel of the *Holway*, which was filed on the 5th of August, 1872, contains the same averments as those above cited from her answer.

The answer of the *Moore*, which was filed on the 4th of December, 1872, contains the same statement of circumstances as that above cited from her libel, except that her answer avers that she swung off on a port helm, while her libel avers that she swung off on a hard a-port helm.

There were on the deck of the *Moore* three persons, namely, Chambers, her master, and who was one of her owners; Collyer, a seaman, who was forward, on the lookout; and Wilson, a seaman, a Swede, who was at the helm. Chambers was examined orally at the trial. Collyer was examined by deposition on the 27th of November, 1872. Wilson was not examined. Warren, the mate of the *Moore*, who had been asleep below, and reached her deck just as the two vessels struck, was examined by deposition on the 5th of December, 1872. Thus, there are three witnesses from the *Moore*, two of whom were of the watch on deck.

There were on the deck of the *Holway*, her watch,

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consisting of two persons, namely, her mate, A. L. Thompson, who was forward on the lookout, and a seaman named Wilson, at the wheel. Her master, G. E. Thompson, and who was one of her owners, had been below, but came on deck before the collision. The master and the mate, who are brothers, were examined by deposition on the 6th of August, 1872, and were also examined orally at the trial. They are the only witnesses from the Holway.

The only case set up by the Moore, in her pleadings, is, that the Holway, being close-hauled on her starboard tack, was bound to keep her course, but failed to do so, and, instead, starboarded, and so thwarted the efforts which the Moore made, by porting, to keep out of the way of the Holway.

There is a dispute as to the wind. The Moore insists that it was east-northeast, and that the Holway could lay her north course up the bay, having six points of wind in which to do so. In this view, the witnesses from the Moore say that they thought at the time that the Holway was on a north course. The Holway contends that the wind was north-northeast, and that she was heading northwest by north half north, thus heading four and a half points off the wind, and making really a northwest by north course, falling to leeward half a point, and unable to make her north course, having been beating and tacking, and sailing as close to the wind as she could. Whether the wind was north-northeast or east-northeast, it was free for the Moore, in either case, being either two points or six points abaft her beam, on her port side.

It is positively testified by those on the Holway, that she was as close-hauled as she could be; that her actual course by the compass, after the Moore was seen by her, and down to the moment before the collision, was northwest by north half north; that her helm was kept steady, and she was kept on the same course, because

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of the approach of the *Moore*, and 'under an order given with that view; that her helm was not starboarded; and that, when the collision was inevitable, her helm was ported, in order to prevent her being run over by the *Moore*, and to make the blow one of the stem of the *Holway* against the *Moore*. The testimony of witnesses from a sailing vessel, as to the course of such vessel, her being close-hauled or not, and her compass course, is much more reliable than the testimony thereto of witnesses from another vessel, which is herself sailing free. The evidence in this case has brought me to the conclusion, that the *Moore* mistook the course of the *Holway*. The *Holway* was really crossing the course of the *Moore*, at an angle of from two and a half to three points. The colored lights of both vessels were burning. The master of the *Moore* says that he saw both of the colored lights of the *Holway* a little off his port bow, and immediately ported, and that afterwards the *Holway* shut in her red right, her green light continuing visible. Admitting that, if the *Moore* was on a south course, and the *Holway* on a course northwest by north half north, the *Moore* could not have seen the red light of the *Holway*, still, if one of the two conclusions must be reached, either that the red light of the *Holway* was not seen by the *Moore*, before the *Moore* ported, or that the *Holway* was not on a course northwest by north half north, the whole evidence makes it impossible to adopt the latter view. I conclude, therefore, that the case is one falling under the 12th Rule. The two vessels were crossing, so as to involve risk of collision, and they had the wind on different sides, and the *Moore* having the wind free, on her port side, was bound to keep out of the way of the *Holway*, and the *Holway* was bound, by the 18th Rule, to keep her course, and did keep her course. The pleadings of the *Moore* put the case as one of an observance by the *Moore* of the 12th Rule, and a violation by the *Holway* of the 18th Rule. They do not put the case as

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one under the 11th Rule, where both of the vessels were bound to port, as meeting end on, or nearly end on. For, although the Moore sets up, in her pleadings, that she ported, and did right in porting, yet she does not set up therein that the Holway ought to have ported, and did wrong in not porting. On the contrary, the pleadings of the Moore assert that the Holway was close-hauled; that the master of the Moore saw that the Holway was close-hauled; that, because he so saw he ordered the helm of the Moore to be ported; that the Holway, being close-hauled, was bound to keep her course; and that, if she had kept her course, no collision would have occurred. This being so, the Moore, even if she were to establish that the vessels were meeting end on, could not be permitted to contend that it required porting by the Holway to prevent a collision. The Moore has affirmed in her pleadings, that an adherence by the Holway to her close-hauled course, combined with the porting done by the Moore, would have avoided a collision. It is not meant to be implied, by anything I have said, that, if the Holway had been heading north, close-hauled on her starboard tack, so that the vessels were meeting end on, or nearly so, so as to involve risk of collision, the case would have been one requiring the Holway to port her helm. It is certainly true, however, that where the Moore, in her pleadings, asserts, that, the Moore having ported, porting by the Holway was unnecessary, to avoid a collision, the Moore cannot be heard to say that it was a fault in the Holway not to have ported, the Moore having ported.

The libel of the Moore must be dismissed, with costs. On the libel of the Holway, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them.

A. J. Heath, for the Holway.

D. McMahon, for the Moore.

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JUNE, 1878.

**THE UNITED STATES v. TWO HUNDRED AND
THIRTY-SIX DOZEN BOXES CONTAINING
COSMETICS KNOWN AS LILY WHITE.**

**INTERNAL REVENUE.—STAMPS ON COSMETICS EXPORTED.—FORFEITURE.
—CONSTRUCTION OF STATUTES.**

A manufacturer of cosmetics in New York, having received an order from a customer at Havana, put up the goods and sent them, without any internal revenue stamp being affixed to any of the boxes, to the wharf of the Havana steamer, for transportation to Havana. The owners of the steamer gave a receipt for them. They were then seized by the Government, and an information was filed to forfeit them, on the ground of their not having stamps on the boxes. The goods were not manufactured in the warehouses prescribed by the 28th section of the internal revenue Act of March 3d, 1878 (12 *U. S. Stat. at Large*, 727), and the 168th section of the Act of June 30th, 1864 (18 *Id.* 296):

Held, That, under the 167th section of the Act of June 30th, 1864, as amended by the 1st section of the Act of March 3d, 1865 (*Id.* 482), the goods should have been stamped, although they were intended for exportation, and, not having been stamped, were liable to forfeiture.

BLATCHFORD, J. This is an information on a seizure of 236 dozen boxes containing cosmetics, known as lily white, which are alleged to be forfeited to the United States for a violation of the internal revenue laws. It comes before the Court on an agreed statement of facts. The information avers that the articles seized were articles or commodities mentioned in Schedule O of the Act of June 30th, 1864, and Acts amendatory thereof, and were subject thereby to a duty of one cent on each of said boxes, and were manufactured by Felix B. Strouse, a manufacturer of said articles or commodities, at his manufactory, number 84 Duane street, in the city of New

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York, and that Strouse, on the 18th of February, 1873, at the city of New York, sold, sent out, removed, or delivered the said articles or commodities, so manufactured, before the duty thereon had been fully paid, by affixing thereon the proper stamp, as provided by law, and removed, or conveyed away, or deposited the same in some place, to evade the duty chargeable thereon, contrary to the statute of the United States in such case provided, whereby the same became forfeited to the United States.

The goods were found on the wharf of the Havana steamer, in New York, in a case addressed, "G. D. M., Habana." They were manufactured in New York, by the claimant, and were a cosmetic, with no admixture of domestic spirits. The claimant had received from G. Del Monte of Havana, Cuba, a merchant there, an order, sent from Havana, in these words: "Send 25 gross cascarilla, oval, medium size, equal to what I had before." Del Monte was not an agent of the claimant, but was a frequent purchaser of goods from the claimant. The claimant put up the goods in question, in pursuance of this order, and sent them, without any internal revenue stamps being affixed to any of the boxes, to the wharf of the Havana steamer, in a case, addressed as above, for transportation to Havana. The owners of the steamer received the case from the claimant, and gave him a receipt therefor, containing its address, as above. The case was then seized. In the ordinary course of business, if the goods had not been seized, the claimant would have received from the owners of the steamer a bill of lading for the goods, expressing their consignment to Del Monte, and would have forwarded such bill of lading to Del Monte, at Havana; and the claimant would have had the goods insured on his own behalf against the risks of the voyage to Havana. The retail price or value of each box, and of the cosmetic in it, did not exceed 25 cents, and

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the boxes were, in all respects, such packages as could not be lawfully sold in the United States, or lawfully removed for consumption or sale in the United States, without having a revenue stamp, denoting the payment of a tax of one cent, affixed to each package.

The 167th section of the Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 296), as amended by the 1st section of the Act of March 3d, 1865 (*Id.* 482), provides, that every maker or manufacturer of any of the articles or commodities mentioned in Schedule C of that Act, who shall "sell, expose for sale, send out, remove, or deliver any article or commodity, manufactured as aforesaid, before the duty thereon shall have been fully paid, by affixing thereon the proper stamp, as provided by law, * * or who shall remove, or convey away, or deposit, or cause to be removed, or conveyed away from, or deposited in, any place, any such article or commodity, to evade the duty chargeable thereon, or any part thereof, shall be subject to a penalty of one hundred dollars, together with the forfeiture of any such article or commodity." Schedule C of the Act imposes a stamp duty of one cent on every packet, box, or other enclosure, containing any cosmetic, "made, prepared, and sold or removed for consumption and sale in the United States," where such packet, box, or other enclosure, with its contents, shall not exceed, at the retail price or value, the sum of 25 cents. The same Schedule C imposes a stamp duty of one cent on every packet, box, or other enclosure, containing any medicinal preparations or compositions, "made and sold, or removed for consumption and sale, * * wherein the person making or preparing the same has, or claims to have, any private formula, or occult or secret art, for the making or preparing the same, or has, or claims to have, any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or held out or recommended to the pub-

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lic, by the makers, venders, or proprietors thereof, as proprietary medicines, or as remedies or specifics for any disease, diseases, or affections whatever affecting the human or animal body," where such packet, box, or other enclosure, with its contents, shall not exceed, at retail price or value, the sum of 25 cents. In the portion of Schedule C which relates to cosmetics, the words are, "made, prepared, and sold or removed for consumption and sale in the United States." In the portion of Schedule C which relates to medicinal preparations, the words are, "made and sold, or removed for consumption and sale." On this difference in language, it is contended, for the claimant, that the goods seized in this case were not subject to a stamp duty. It is claimed, that the goods were not sold in the United States, and that they were removed for consumption and sale in Havana, and were not removed for consumption and sale in the United States. It is claimed, that the words, "in the United States," in the clause respecting cosmetics, must have some meaning, and that the only proper meaning they can have, in respect to cosmetics not sold in the United States, is to understand the provision as reading, that the duty is imposed on cosmetics made in the United States, and then removed to be consumed in the United States, or to be sold in the United States. In other words, it is contended, that, while the medicinal preparations specified are taxable whenever made in the United States, and then sold or removed for consumption or sale, cosmetics, and the other articles classed therewith in Schedule C, are taxable only when made in the United States, and then sold here or removed for domestic consumption or for domestic sale.

A consideration of the history of the legislation on the subject of taxing the articles taxed by Schedule C of the Act of 1864 will show that the view urged by the claimant cannot prevail.

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Schedule C, following section 110 of the Act of July 1st, 1862 (12 *U. S. Stat. at Large*, 484), contained like provisions with those of Schedule C in the Act of 1864, in regard to taxing medicinal preparations, and like provisions to those of Schedule C in the Act of 1864, in regard to taxing cosmetics. The 109th section of the Act of 1862 contained the same provisions which are found in the 167th section of the Act of 1864, and this additional proviso, not found in the Act of 1864: "Provided, that medicines, preparations, compositions, perfumery and cosmetics, upon which stamp duties are required by this Act, may, when intended for exportation, be manufactured and sold, or removed, without having stamps affixed thereto, and without being charged with duty, as aforesaid; and every manufacturer or maker of any article, as aforesaid, intended for exportation, shall give such bonds, and be subject to such rules and regulations, to protect the revenue against fraud, as may be from time to time prescribed by the Secretary of the Treasury." It is manifest, from this proviso, that Congress regarded Schedule C of the Act of 1862, in its imposition of a tax on medicines, preparations, compositions, perfumery and cosmetics, as imposing such tax on articles intended for exportation as well as on articles not intended for exportation, because it proceeds, in the proviso, to enact how such articles, when intended for exportation, may be relieved from the tax to which they would otherwise be subject, by reason of being made here and sold here, or made here and removed from their place of manufacture for consumption or for sale. It follows, therefore, that Congress regarded the words, "in the United States," found in the clause of Schedule C respecting perfumery and cosmetics, and not found in the clause of Schedule C respecting medicines and preparations, as not having any such effect as is here contended for by the claimant.

It serves to confirm this view, that Congress, by the

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27th section of the Act of March 3d, 1863 (12 *U. S. Stat. at Large*, 727), enacted that any person, who should, after September 30th, 1863, offer for sale any of the articles named in Schedule C of the Act of 1862, whether the articles so offered were imported, or were of foreign or domestic manufacture, should be deemed the manufacturer thereof, and subject to all the duties, liabilities and penalties imposed by the Act of 1862 in regard to the sale of such articles without the use of the proper stamp or stamps as required in the Act of 1862. This enactment is reproduced, in substance, in the 169th section of the Act of 1864, with the addition of the proviso, that, when any such imported articles shall be sold in the original and unbroken package in which the bottles or other inclosures were packed by the manufacturer, the person so selling said articles shall not be subject to any penalty on account of the want of the proper stamp.

But, Congress, probably finding that the provision for exportation in the 109th section of the Act of 1862 did not sufficiently "protect the revenue against fraud," in the words of such proviso, enacted, by the 28th section of the Act of 1863, "that all medicines, preparations, compositions, perfumery and cosmetics, intended for exportation," as provided for in section 109 of the Act of 1862, "in order to be manufactured and sold or removed, without being charged with duty, and without having a stamp affixed thereto, may, under such rules and regulations as the Secretary of the Treasury may prescribe, be made and manufactured in warehouses known and designated, in treasury regulations, as bonded warehouses, class two." The 28th section then goes on to provide for the giving of bonds by "such manufacturer," and then says: "Such goods, when manufactured in such warehouses, may be removed for exportation, under the direction of the revenue officer having charge thereof, without being charged with duty and without having a stamp affixed thereto." The same section then goes on

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to provide, that such manufacturer, having such bonded warehouse, may, under regulations, convey therein any materials to be used in such manufacture which are allowed by the provisions of the Act of 1862 to be exported free from tax or duty, as well as the necessary articles for the preparation, putting up and export of the said manufactured articles, and that every article so used shall be exempt from stamp and excise duty ; that articles and materials so to be used may be transferred from any bonded warehouse, under regulations, into any bonded warehouse, class two, in which such manufacture may be conducted, and may be used in such manufacture, and, when so used, shall be exempt from stamp and excise duty ; and that any materials imported into the United States may, under regulations, be removed in original packages from on ship board, or from bonded warehouses, into the bonded warehouse, class two, in which such manufacture may be carried on, for the purpose of being used in such manufacture, without payment of duties thereon, and may be there used in such manufacture. The same section then goes on to say : " No article so removed, nor any article manufactured in said bonded warehouse, class two, shall be taken therefrom except for exportation, under the direction of the proper officer of the customs having charge thereof." It is very evident that Congress intended that these regulations of the 28th section of the Act of 1863 should supersede the provision for exportation made in the proviso to the 109th section of the Act of 1862 ; and that, if it was desired to export the manufactured articles without paying a stamp duty on them, they should be manufactured in the warehouses prescribed and under the regulations provided, with the additional privileges in regard to the use of raw materials, domestic and imported, without paying excise or customs duties thereon. These provisions of the 28th section of the Act of 1863 are re-enacted, in substance, in the 168th section of the

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Act of 1864, while, as before remarked, the proviso to the 109th section of the Act of 1862 is not found in the 167th section of the Act of 1864, which latter section is otherwise a re-enactment of the said 109th section. The articles in question here were not made in any such bonded warehouse as is provided for, and, therefore, could not be removed from the place of manufacture, or exported, without payment of the stamp duty provided for in Schedule O of the Act of 1864.

A judgment of forfeiture of the articles seized must be entered.

Thomas Simons (Assistant District Attorney), for the United States.

Thomas Harland, for the claimant.

JUNE, 1874.

THE STEAMBOAT GEN. FRANZ SIGEL.

COLLISION IN EAST RIVER.—STEAMBOATS CROSSING.—CHANGE OF COURSE.—NEARNESS TO PIERS.

A ferry-boat was crossing the East river from New York to Brooklyn. The tide being strong ebb, she went above her slip, to drop down with the tide. Her pilot saw a steamboat, heavily loaded, coming slowly up the river on his starboard hand, close in to the Brooklyn piers. He blew two whistles, indicating that he intended to go ahead of the other boat, although her position was such that he could not do so unless she changed her course. The whistles were not heard, and the steamboat kept on. Thereupon the ferry-boat stopped her engine, but did not reverse it, till the steamboat had proceeded so far as to strike a cross tide, which set her out from the piers. The pilot of the ferry-boat then reversed the engine, but too late, and the vessels came together. The pilot of the steamboat made no change in her helm, and stopped and reversed her engine as soon as he saw there was danger of collision :

Held, That the ferry-boat having the steamboat on her starboard side, was bound to keep out of her way, and the steamboat was bound to keep her course;

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That the swinging out of the steamboat, when she met the cross tide, was not a change of her course ;

That, as the pilot of each vessel saw the other in time to execute all manœuvres incumbent to avoid a collision, the question of lookout had nothing to do with the collision ;

That the closeness of the steamboat to the piers did not contribute to the collision ;

That the pilot of the ferry-boat should have taken the measures to avoid the steamboat, which were necessary, under the circumstances, and that the ferry-boat was solely in fault.

BLATCHFORD, J. This is a libel to recover the damages sustained by the libellants in consequence of injuries sustained by the steam ferry-boat George Washington, through a collision which took place between her and the steamboat Gen. Franz Sigel, in the East river, on the 19th of July, 1871, in the day time. The ferry-boat was a side-wheel steamboat running on a ferry between Oliver street slip, New York, and the foot of Bridge street, Brooklyn, and was, at the time, on a trip from New York to Brooklyn. The Sigel was a propeller, and was deeply laden with a cargo of hogsheads of sugar, which she was taking from Prentice's stores, in Brooklyn, below Bridge street, to the foot of Gold street, Brooklyn, above Bridge street. The tide was strong ebb, and the wind was blowing fresh down the river and with the tide.

The libel alleges, that, as the ferry-boat was proceeding on her trip, the Sigel was observed going up the East river, in violation of law, close on to the docks on the Brooklyn shore ; that, when the ferry-boat had headed for Brooklyn, to head for her slip, the Sigel still keeping unlawfully close to the docks, the ferry-boat was stopped ; that the Sigel continued on until near the line of the heading of the ferry-boat, when she suddenly sheered out on to the ferry-boat, without any notice ; that, although the ferry-boat was backed, and all in the power of those on board was done to avoid the collision, the Sigel hit the ferry-boat, damaging her badly ; that

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the collision happened wholly by the fault of those on the Sigel, in violating the law by not keeping a lookout, in not in time taking proper steps to avoid a collision, and in sheering out on to the ferry-boat; and that the collision happened without the fault of those on the ferry-boat, and could not have been prevented by them.

The answer denies these allegations of the libel, and avers, that, when the Sigel was a little below the ferry slip at the foot of Bridge street, Brooklyn, and more than three hundred feet from the docks on the Brooklyn shore, the ferry boat, which, owing to the wind and tide, and in order to make the slip at the foot of Bridge street, had proceeded up the river a considerable distance above the slip, and was floating down with her broadside to the wind and current, was carried by the force of the wind and tide below the said slip, and drifted upon the Sigel; that the pilot on the Sigel, as soon as he saw there was any danger of a collision, stopped the Sigel, and reversed her engine, and did all in his power to avoid it; that, the Sigel being heavily laden, and deep in the water, while the ferry-boat was light, and high out of the water, and had her broadside to the wind and current, no effort on the part of the pilot of the Sigel availed to prevent the ferry-boat from coming upon the Sigel; that the collision happened without the fault of those in command of the Sigel, and could not have been avoided by any skill or care on their part; that it happened wholly through the fault, want of skill and mismanagement of those in charge of the ferry-boat, in their permitting her to drift with the wind and tide in the manner they did, and in not taking any steps whatever to avoid the collision; and that the collision could have been avoided by the ferry-boat, had she either gone ahead in proper time and entered the slip, or had she backed when it was found she was drifting below the slip.

The libel sets up three faults on the part of the Sigel as causing the collision—violating the law by not keep-

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ing a lookout—not in time taking proper steps to avoid a collision—sheering out on to the ferry-boat.

As to a lookout, the question of a lookout on either vessel had, according to the evidence, nothing to do with the collision. The pilot of each vessel saw the other vessel in abundant season to execute all manœuvres incumbent to avoid a collision.

As to the taking of steps by the Sigel to avoid a collision, it was not her duty to do so, in the first instance. The vessels were crossing, so as to involve risk of collision. The ferry-boat had the Sigel on her own starboard side, and therefore, by Rule 14, was bound to keep out of the way of the Sigel, and the Sigel, by Rule 18, was bound to keep her course.

As to the sheering out of the Sigel on to the ferry-boat, the setting up, in the libel, of the fact of such sheering, recognizes the duty of the ferry-boat to keep out of the way of the Sigel. No excuse is alleged, in the libel, why the ferry-boat did not keep out of the way of the Sigel, except that the Sigel sheered on to the ferry-boat, without any notice. This implies a voluntary sheering of the Sigel, a sheering which was unexpected to the ferry-boat, which the ferry-boat had no notice of and no reason to expect would occur, a sheering which the Sigel had an election to make or not to make, and which the ferry-boat could have no knowledge would occur unless previously notified by the Sigel that it would occur. But, the evidence of the pilot of the ferry-boat is, that when he was on the New York side of the river, he saw the Sigel going up close, as he thought, to the Brooklyn docks, and not more, as he thought, than ten or fifteen feet from the ends of such docks. The evidence also is, that, in the then state of the tide, a vessel going up at that distance from the docks must, when she reaches the place where the Sigel is said to have sheered, be struck on her starboard bow by a cross tide from above setting out from the Brooklyn shore. It is

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also the weight of the evidence, that, whatever distance off from the Brooklyn shore the Sigel was in her passage up, when she was first seen by the pilot of the ferry-boat, she continued the same distance off, neither approaching to nor receding from the Brooklyn shore until she began to take the alleged sheer; that whatever sheer she took was wholly caused by the cross tide referred to; that her pilot did not starboard his helm, or take a sheer in any voluntary or active sense, but ported his helm, against the cross tide; that he stopped and reversed his engine as soon as he saw there was danger of a collision; that his boat was a slow boat, heavily loaded and loaded by the head; that she was a well known boat in the waters she was in, being constantly engaged in carrying like cargoes between the two points between which she was then plying; that her condition as to quantity of cargo and the manner of her loading were plainly visible to the pilot of the ferry-boat; and that her speed all the way up, and before she struck the cross tide, was very low, making it evident that the effect of the cross tide upon her would be serious. In view of all this, I can see no fault on the part of the Sigel contributing to the collision. On the contrary, the ferry-boat, with a knowledge actual or imputable, on the part of her pilot, of the state and action of the tides, and of the predicament, position, and capabilities of the Sigel, and with a duty, incumbent on the ferry-boat, to avoid the Sigel, undertook, when the Sigel was two or three piers below the slip which the ferry-boat was intending to enter, to compel the Sigel to get out of the way of the ferry-boat. For that purpose, the ferry-boat gave a signal of two blasts of her steam whistle, indicating that she intended to pass into her slip ahead of the Sigel, a thing which she could not do unless the Sigel should change her course. This signal was not heard on board of the Sigel, and, of course, was not answered by the Sigel. Thereupon, the ferry-boat stopped her engine,

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but she did not reverse it, and she continued to have upon her such headway as was due to her former impetus. During this time, her pilot says he saw the Sigel proceed up without changing her course, and without slackening her speed, until she passed across and beyond the mouth of the ferry-slip, the ferry-boat being, at the time, still further up the river, with a view, as was usual and proper, of having the ebb tide carry her down, so she could enter her slip. Then the cross tide struck the Sigel. As soon as the pilot of the ferry-boat saw the effect of the cross tide on the Sigel, he backed his boat. But he should have backed sooner, or he should not have allowed his boat to get so near to the Sigel. The onward movement left to his boat, when he stopped, concurring with the wind and tide on his port broadside, carried his boat against the Sigel faster than it was possible for the Sigel to recede. I can see no fault in the Sigel.

The libel does not specify as a fault causing or contributing to the collision the Sigel's proximity to the Brooklyn docks. It alleges that the Sigel violated the law by her closeness to the docks. But the closeness of the Sigel to the docks was not, on the facts of this case, a fault contributing to the collision, if it was a fault at all, or a violation of law. The pilot of the ferry-boat saw just where the Sigel was and what she was, and was bound to know, on his own idea of her position, that she would do, when she struck the cross tide, just what it is shown she did do, and it would have been very easy for him to have kept farther off from her, and then have passed under her stern. The Sigel did not change her course, in any proper sense of the term, but kept it, and the ferry-boat, by proceeding on too far, drifted, by the action of the wind and tide, down upon the Sigel.

The libel must be dismissed, with costs.

C. Donohue, for the libellants.

E. H. Owen, for the claimants.

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NATHANIEL MCKAY v. EDWIN C. B. GARCIA.

**SUIT AGAINST CONSUL.—PRACTICE.—ARREST.—APPLICABILITY OF THE
NEW YORK CODE.—PENDENCY OF ANOTHER SUIT FOR THE SAME
CAUSE OF ACTION.**

An action of debt was brought against a foreign consul, for money received in a fiduciary capacity. The defendant, being arrested, moved on affidavits to vacate the arrest:

Held, That, under the Act of February 28th, 1839 (5 *U. S. Stat. at Large*, 321), in connection with the Act of January 14th, 1841 (*Id.* 410), and the 179th section of the New York Code of Procedure, the defendant was liable to arrest in the action;

That, under the 5th section of the Act of June 1st, 1872 (17 *U. S. Stat. at Large*, 197), the plaintiff had the right, under the 205th section of that Code, to oppose the defendant's affidavits by affidavits in addition to those on which the arrest was granted;

That the pendency of another action in a State Court against the defendant for the same cause of action was of no importance, as the State Court had no jurisdiction of an action against a consul, and would be no defence if the defendant were not such;

That the motion to discharge the defendant must be denied.

BLATCHFORD, J. This is an action for a debt. By the Act of February 28th, 1839 (5 *U. S. Stat. at Large*, 321), in connection with the Act of January 14th, 1841 (*Id.* 410), imprisonment for debt is allowed, on process issuing out of a Court of the United States, where, by the laws of the State, imprisonment for debt shall be allowed, the conditions and restrictions prescribed by the State being applicable to the process issuing out of the Court of the United States. The Act of 1839 provides that "the same proceedings shall be had" in the Court of the United States "as are adopted in the Courts of such State."

The 179th section of the Code of Procedure of New

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York provides for the arrest and imprisonment of a defendant in an action for money received in a fiduciary capacity. This is such an action.

This being an action at law, the practice in it must, under the 5th section of the Act of June 1st, 1872 (17 *U. S. Stat. at Large*, 197), conform, as near as may be, to the practice now existing in a like cause in the Courts of record of the State of New York.

The defendant having moved, on affidavits on his part, to substantially vacate the order to hold to bail, the plaintiff has a right, under the provisions of section 205 of the Code of Procedure of New York, to oppose such motion on new and further affidavits and proofs, in addition to those on which the order to hold to bail was made.

The pendency of a former suit against the defendant in a State Court for the same cause of action, is of no importance, for such State Court was and is without jurisdiction of the suit, as the defendant was and is a foreign consul. But if he were not, the weight of authority is that the fact of the pendency of such suit in the State Court would be of no effect on this suit (*Loring v. Marsh*, 2 *Clifford*, 311, 322).

The cause of action here is one which was assignable.

On all the affidavits and papers on both sides, I am of opinion that the order to hold to bail would have been properly grantable in the first instance. If so, it must be upheld.

The motion to vacate the order to hold to bail and to discharge the defendant from bail to the marshal on his filing common bail, is denied.

William Tracy, for the motion.

William Blaikie and *Merritt E. Sawyer*, opposed.

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**THE UNITED STATES v. THREE CASES,
MARKED A. D. 1, 2 & 3.****IMPORT ACTS.—LANDING GOODS WITHOUT PERMIT.—PASSENGER'S
BAGGAGE.**

A passenger by a steamer from a foreign country had, among his personal baggage, three ordinary goods cases, filled with new and dutiable goods only, intended for sale as such. They were landed on the wharf with the personal baggage of the passengers. They were not named in the manifest of the vessel. No entry was made of the goods, nor had any duties on them been paid or secured to be paid; and no permit had been granted to land them, except the general baggage permit issued for the vessel, which authorized the inspector on board to "examine the baggage of all the passengers, and, if nothing be found but personal baggage, permit the same to be landed, and send all other articles not permitted in due time to the appraiser's stores." The cases were seized on the wharf, and an information filed to forfeit them, under the 50th section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 865), as landed without a permit:

Held, That, on the above facts, the jury must find a verdict in favor of the Government.

BLATCHFORD, J., in charging the jury, said :

This is a seizure of merchandise, alleged to be forfeited under the provisions of the 50th section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 665), which enacts, that no goods, wares or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladed or delivered from such ship or vessel, within the United States, without a permit from the collector of the port, and the naval officer, if any, for such unloading and delivery, and that, if any goods, wares or merchandise shall be unladen or delivered from any such ship or vessel contrary to the direction aforesaid, all goods, wares or merchandise so unladen or delivered shall become forfeited, and may be seized by any of the officers of the customs. The permit referred to in the

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50th section is the permit mentioned in the 49th section of the same Act, which enacts, that, after an entry of merchandise, and an estimation of the amount of duties on it, and the paying or securing to be paid of such duties, a permit shall be granted by the collector and the naval officer (if there be one), to land the merchandise of which entry shall have been so made, and that then, and not before, it shall be lawful to land the same. The 49th section then proceeds to prescribe the contents of such permit and enact that the form of such permit shall be so and so. Such form contains a certificate that the duties on the merchandise have been paid or secured to be paid, in conformity to the entry thereof, and a permission to land the same.

In the present case, the property seized is dutiable merchandise, intended for sale as such. It was seized after it had been landed within the United States from the vessel in which it had been brought from a foreign port. At the time of its seizure no entry had been made of it, and no duties had been paid, or secured to be paid, upon it, and no permit had been granted to land it, except such permit as I shall hereafter refer to. The owner of the merchandise came as a passenger in the vessel which brought the three cases of merchandise in question. They were ordinary goods cases, the goods were all of them new goods, and there was nothing but such goods in the cases. The cases were taken on board of the vessel at the foreign port by their owner, with her personal baggage, and were landed on the wharf in the United States with the personal baggage of the passengers. The cases were not named in the manifest of the vessel. The only permit issued, under which it is claimed the cases could have been landed, was a baggage permit, being a filled up blank, which, as a blank, read as follows : " The inspector on board the from will examine the baggage of all the passengers, and, if nothing be found but personal baggage, permit the same to

be landed, and send all other articles not permitted in due time to the appraiser's stores, No. 119 Greenwich street.

Naval officer.

Collector. Custom House, New York, 187 ."

Such a baggage permit is issued under the 46th section of the same Act, which provides, that the wearing apparel and other personal baggage, of persons who arrive in the United States, shall be exempted from duty ; that, to ascertain what articles ought to be exempted under such provision, due entry thereof shall be made, as of other merchandise, but separate and distinct from that of any other merchandise imported from a foreign port, and that an oath shall be taken on such entry, and, in certain cases, a bond shall be given ; that, on compliance with such conditions, and not otherwise, a permit shall and may be granted for landing the said articles, provided, nevertheless, that, whenever the collector and naval officer (if any) shall think proper so to do, they may, in lieu of the foregoing provisions, direct the baggage of any person arriving within the United States to be examined by the surveyor of the port, or an inspector of the customs, and to make a return of the same ; that, if any articles shall be contained therein which, in their opinion, ought not to be exempted from duty, due entry shall be made therefor, and the duties thereon paid or secured to be paid ; and that, whenever any articles subject to duty shall be found in the baggage of any person arriving within the United States, which shall not, at the time of making entry for such baggage, be mentioned to the collector before whom such entry is made, by the person making the same, all such articles so found shall be forfeited.

On the arrival of a vessel from a foreign port, at her wharf here, it is usual for the officers of the customs, assuming to act under a baggage permit of the foregoing form, to allow the officers of the vessel to remove therefrom and put upon the wharf what is called the personal

baggage of the passengers, before any examination thereof is made. After such landing, and not before, the nature of the contents of the packages alleged to compose such personal baggage is ascertained by the customs officers. This was the course pursued in respect to the cases in question.

I have repeatedly ruled heretofore, that merchandise situated as was that in this case cannot be lawfully unladen or delivered from the vessel, except according to the regulations prescribed by the 49th section of the Act; that the provisions of the 46th section do not apply to such merchandise; and that, if such merchandise is not unladen in compliance with the 49th section, it becomes, under the 50th section, forfeited to the United States, after it is unladen. I must, therefore, direct a verdict for the United States, condemning the merchandise in question.

The ruling referred to, and that now made, is limited to a state of facts like that presented in this case; and it is not intended to decide that, if a passenger by a vessel brings with him dutiable goods for his personal use, or for gifts, or otherwise, not for sale as merchandise, and the same be landed with or among his personal baggage, in the manner before described, or under any state of facts different from that presented in this case, such goods are subject to forfeiture under the 50th section, before mentioned. But the practice of importing considerable quantities of dutiable merchandise, intended for sale, with or among personal effects, under the guise of personal baggage, is one especially dangerous to the revenue, as affording great facilities for the commission of fraud, and is one prohibited by law. The regular provisions for the protection of the revenue, by way of manifest, invoice, entry and permit, are evaded by such practice, and a forfeiture of the merchandise is incurred. If it is incurred without wilful negligence, or any intention of fraud in the person incurring it, the Secretary

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of the Treasury has the power, under the 1st section of the Act of March 3d, 1797 (1 *U. S. Stat. at Large*, 506), to remit or mitigate the forfeiture.

T. Simons and *R. M. Sherman* (*Assistant District Attorneys*), for the United States.

J. McKeon, for the claimant.

Eastern District of New York.

JUNE, 1878.

SAMUEL CAREY v. JOSHUA ATKINS AND
EDWIN ATKINS.

DELIVERY OF CARGO.—BILL OF LADING.—BREAKAGE.

A ship received on board, in Havre, a number of millstones to be carried to New York, under a bill of lading containing the clause "not accountable for breakage." On the delivery of the stones, four were found to be broken, and two others never came to the possession of the consignees, who brought this action against the owners of the ship to recover the value of the six stones :

Held, That it was incumbent on the owners of the ship; at least, to show that the two missing stones were discharged upon the wharf and placed with the others in that part of it which had been selected for the deposit of the libellant's goods;

That, as the respondents had not furnished such proof, they were liable for the value of the missing stones ;

That it was not made to appear that there was any negligence in stowing or landing the stones, and, under the bill of lading, the respondents were not liable for breakage not shown to have arisen from negligence.

BENEDICT, J. This is an action to recover the value of six millstones, part of a shipment made in Havre,

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upon the bark *Amelia*, to be delivered to the libellant in New York. Of a number of stones shipped, two never came to the possession of the libellants; and of those which were received, four were broken. As to the two missing stones, the ship must be held liable, there being no satisfactory evidence of their delivery in New York. They may have been landed from the vessel, but the delivery of the cargo was conducted in a very loose and unsatisfactory way, and the persons who conducted it appear to have little knowledge as to what disposition was afterwards made of the cargo. They know nothing of the missing stones. It was incumbent upon the ship, at least, to be able to show that the missing stones were discharged upon the wharf and placed with the others in that part of the wharf selected for the deposit of the libellant's goods. The testimony furnishes no evidence as to how many of the libellant's stones were landed, nor how many stones were set apart for the libellant upon the wharf, but does disclose that the two missing stones were never receipted for or taken by the carman, and never came into the actual possession of the libellant. The ship is, therefore, liable for their value.

As to the broken stones, the case is different. The stowage of the ship is proved to have been good, and there is no evidence of any negligence on the part of the ship in the stowing of the stones or in the landing of them upon the wharf. The bill of lading contains an exemption of liability for breakage; and, upon the proofs, the ship is not liable, upon such a bill of lading, for breakage not shown to have arisen from negligence.

For libellant, *James K. Hill*.

For respondents, *Owen, Nash & Gray*.

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THE BARK ONORE.**JURISDICTION.—COOPERAGE.**

The admiralty has jurisdiction of a contract made between the master of a ship and a cooper, to put the cargo of the ship in landing order, the services being rendered partly on the ship and partly on the wharf, but before the delivery of the cargo.

BENEDICT, J. The question in this case is whether the admiralty has jurisdiction of a contract, made between the master of a ship and a cooper, to put in landing order the cargo of the ship, the services being rendered partly upon a wharf where the voyage terminated, and partly upon the ship, and prior to the delivery of the cargo to the consignees.

My opinion is that such a service is maritime, and consequently the contract is within the jurisdiction of the admiralty. The reason why such a service is maritime, is, because it is a service necessary to enable the ship to earn freight, which is the sole object for which the ship is constructed and navigated. The contract of a ship is to carry and deliver the cargo. When the cargo is received in good shipping order, the ship must deliver it in good landing order. All services which accomplish this end, or tend to accomplish this end, are compensated for by the freight paid, and in a proper sense form part of the maritime adventure in which the ship is engaged; and the character of such services is determined by the character of the contract to which they are incident. Services such as are described in the present case, seem to be of this description, and in my opinion, are maritime in character. It is no objection to their being maritime that

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they are performed on land, or that they are performed by persons not seamen. Many maritime contracts are performed on land, and by persons having no immediate connection with the sea. The services in question are maritime, because they are a necessary part of the maritime service which the ship renders to the cargo, and without which the object of the voyage would not be accomplished.

The objection to the jurisdiction must, therefore, be overruled, and as there is no dispute as to the rendering of the services or their value, the libellant is entitled to a decree for the amount of his claim, with costs.

For libellant, *Wilcox & Hobbs*.

For claimants, *Beebe, Donohue & Cooke*.

JUNE, 1873.

THE CARGO OF THE BARK LUTENEN.

LUCAS E. POST *v.* WILLIAM H. T. HUGHES.

POSSESSION.—CHARTER.—EXCEPTED PERILS.—RIGHT OF MASTER TO SELL CARGO.—BREAKING UP VOYAGE.—INJURY TO VESSEL AND CARGO.

A bark was chartered for a voyage from New York to Montevideo, by a charter which contained the clause, "dangers of the seas, fire and navigation mutually excepted." The charterer put on board a full cargo of lumber. On the day the loading was completed, a fire broke out on board, which made it necessary to fill the vessel with water. Both vessel and cargo were damaged, and the cargo had to be unloaded, but could have been carried forward in a damaged condition. In its damaged condition, it was worth in New York \$4,947 26,

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and the freight due on performance of the voyage under the charter, was \$5,105 29. The charterer offered to supply a new cargo, to be carried under the charter in lieu of the damaged one, but the master refused to give up the damaged cargo without payment of full freight. No offer was made to carry the cargo forward in any other ship. The ship was repaired at a cost exceeding her value when repaired; and the master, being without funds to pay for the repairs, which were liens on the vessel, advertised for a loan of \$17,000, which was more than the value of the bark and cargo, upon the security of the vessel, her freight and cargo. Thereupon the charterer demanded his lumber, and, on a refusal to surrender it, except on payment of full freight, filed a libel against the cargo for possession; and, by means of the process issued thereon, took the cargo from the possession of the master, and it was afterwards delivered by the marshal to the charterer, on a stipulation for value taken in Court, to return the cargo or pay whatever the Court should decree the ship to be entitled to receive by reason of the removal of the cargo. The master also filed a libel against the charterer to recover the full freight and the average charges:

Held, That the charterer was entitled to have substituted a sound cargo in place of the damaged cargo; and that the refusal of the master to accept the substituted cargo thus tendered, entitled the charterer to treat the charter as broken by the ship, and to demand the damaged cargo without payment of freight;

That the act of the master in advertising for such a loan on the credit of the cargo, as well as of the ship and freight, was without authority, and authorized the charterer to treat the voyage as broken up by the fault of the ship; and it entitled him to demand the cargo without payment of freight;


That the charterer, therefore, was entitled to a decree declaring him entitled to the possession of the lumber with costs; and that the master's libel must be dismissed, with costs.

BENEDICT, J. On the 3d day of April, the libellant in the first of the above-named actions, at the port of New York, chartered the German bark Luteken for a voyage from New York to Montevideo, and agreed to provide her with a full cargo of lawful merchandise for the aforesaid voyage, to be transported to Montevideo at rates agreed on. The charter party contained the clause "dangers of the seas, fires and navigation mutually' excepted." In accordance with this charter party, the charterer provided a full cargo of lumber, the lading of which was completed on the 17th day of April, 1873. On the same day a fire broke out in the bark, to extinguish which it was necessary to fill the vessel with water, and by reason of the fire, the vessel was so damaged as to require extensive repairs before being able to perform the voyage.

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In order to repair the vessel, it was necessary to unload the cargo, and it was unladen by the master of the vessel. Some of the cargo was also greatly injured by the fire, but the largest part of it was only wet with salt water, and could have been carried to Montevideo in a damaged condition, but without rotting or bleaching. The original cost of the cargo was \$8,518 73. In its damaged condition it was worth in New York, \$4,947 26. The freight on the lumber, payable on performance of the voyage, according to the charter party, was \$5,105 29, gold. The charterer offered, in place of the damaged cargo, to supply a new cargo of lumber, to be transported under the charter in lieu of the damaged cargo, but the master refused to give up the damaged cargo without payment of full freight. No offer was made to carry the cargo in any other ship, or to furnish any other ship, but a survey of the bark was had, and an estimate obtained of the probable cost of repairs, and the bark was thereafter repaired.

The value of the bark, in her damaged condition prior to the repairs, was \$4,500. The total amount of the bills incurred in repairing the vessel, was \$13,314 38; her value, when repaired, as disclosed by a subsequent sale, was \$10,000. Without the payment of the bills for the repairs, and which constituted liens upon the vessel, it was impossible for her to proceed upon the voyage provided in the charter, and the master was wholly without funds, the owners having refused to provide any money wherewith to pay for the repairs. The master, therefore, determined to borrow about \$17,000 upon bottomry and *respondentia*, and on the 12th of June actually advertised for a loan of that amount upon the security of the vessel, her freight and cargo, for the voyage in the charter provided. Whereupon the charterer demanded his lumber, and, upon a refusal to surrender it, except on payment of full freight, he brought his action for possession, which is the first of the actions above named, and



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by means of the process in this Court, took the cargo from the possession of the master. Subsequently, the cargo was delivered by the marshal to the charterer, upon a stipulation for value taken in Court, to return the same or to pay whatever sum the Court should declare the ship entitled to receive by reason of the removal of the cargo under the circumstances.

Thereafter the master also filed his libel against the charterer demanding a decree for the full freight and the average charges, by reason of the premises, which is the second action above mentioned. The two causes have been tried together upon a written statement of facts in which the facts above set forth are contained.

In disposing of the questions of law which have been discussed as arising in these cases, I feel authorized to consider the cases in any aspect presented by the written statement of facts which has been filed, whether such aspect be presented by the pleadings or not. If necessary, the pleadings can be made to conform to the evidence, and they may be so amended.


Upon the facts presented, I am of the opinion that the charterer was justified in demanding his cargo, without payment of any freight, upon two grounds. One ground is, that in view of the damaged condition of the cargo and its depreciation by the fire, to a value less than the freight, it having been unladen and being in the port of shipment, the shipper was entitled to ship in place of it a similar sound cargo, to be transported under the charter party in lieu of the damaged cargo. The ship would sustain no loss by such a change, and by such new shipment the charter party would, in my opinion, have been performed on the part of the charterer. The refusal to accept the substituted cargo which was thus tendered, therefore, entitled the charterer to treat the charter as broken by the ship, and to demand the damaged cargo without payment of freight.

The charterer also became entitled to have his cargo

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without payment of freight, by reason of what subsequently occurred, after the repairs of the ship were completed. It is to be noticed that no question was raised as to the right of the vessel to repair and to earn the freight stipulated in the charter. That right was conceded by the offer to provide a sound cargo, to be transported in lieu of the damaged cargo. It could not be disputed that the ship had the right to repair and earn the freight, notwithstanding the fact that the cargo had become of less value than the freight. Damage to the cargo, without fault of the ship, by an excepted peril, could not deprive the ship of the right to earn the freight she had agreed for.

The subsequent act of the master which caused the shipper to retake his cargo, was the announcement of the master that he was about to raise about \$17,000 upon bottomry and *respondentia*, and that without thus pledging the cargo, he could not proceed upon the voyage. No specific statement by the master that he could not proceed without thus resorting to the cargo, is shown, but the facts admitted fully warranted that inference, and the subsequent sale of the vessel on legal proceedings instituted by the material men, which the statement of facts narrates, shows that the inference was correct. The case, therefore, presents the further question, whether this action of the master in respect to the cargo, under the known circumstances of the ship, did not justify the shipper in treating the voyage as broken up by the fault of the ship, and retaking his cargo without payment of any freight. It is not to be disputed that the master of a ship has power, under some circumstances, to raise money upon the security of the cargo. But when the foundation of this authority is examined, it proves decisive against the right of the master to exercise it in a case like this. The sole foundation for any authority of the master to sell a part or hypothecate the whole of a cargo shipped on board his vessel, is



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the prospect of benefit to the owner of the cargo. Therefore, it has been considered that while under proper circumstances the master might sell a part of his cargo, he could not sell the whole, for the reason that it could be of no possible benefit to the owner of the cargo that the ship proceed empty. What is in all such cases to be sought for as the basis of the master's authority to hypothecate the cargo, is a reasonable expectation of benefit to the owner of the cargo by the completion of the voyage, which is thus accomplished by the use of his property. If this be the limit of the master's authority, then, in the present case, the master was wholly without authority to resort to the cargo, as he proposed, in order to raise money for the purpose of enabling him to complete the voyage, because the completion of the voyage could not possibly be of benefit to the shipper, for his cargo had already become of less value than the freight he would be liable to pay on the termination of the voyage. The proposal of the master to raise money upon the cargo, under the circumstances, was not to raise money for the benefit of the cargo, but, in substance and effect, was to devote the cargo to the payment of the ship's debts, in which the shipper of the cargo had no interest.

The ship was worth \$10,000. The freight, when earned, would be \$5,105 29, and the announcement of the master was that he intended to raise about \$17,000, at marine interest, and to pledge the cargo therefor. Such an intention, if carried into effect, would necessarily have resulted in casting upon the cargo a large part of the expense of the repairs which belonged to the ship alone to pay. The announcement of such an intention was the announcement in the most authoritative way, that the ship was unable to perform the charter, and justified the shipper in treating the voyage as broken up by the fault of the ship, and it entitled him to demand his cargo without payment of freight.

In the Matter of Joseph Metz and others, Bankrupts.

As the liability for the proper share of average expenses is not disputed, and an average bond has been taken, I understand that no action of this Court is required in relation thereto, although those charges form part of the demand set forth in the libel of the master.

The decree must be that in the first action the libellant be declared entitled to the possession of the lumber, and to a decree against the respondent for costs; and, in the second case, that the libel be dismissed, with costs.

For the charterer, *Scudder & Carter*.

For the master, *Goodrich & Wheeler*.

Southern District of New York.

JULY, 1873.

IN THE MATTER OF JOSEPH METZ AND OTHERS, BANKRUPTS.

RENT OF PREMISES AFTER ADJUDICATION.—INJUNCTION.—DIS-
POSSESSION.

The firm of M., B. & C. hired premises in New York city, at a rent of \$7,500 per annum, payable monthly. On the 1st of May, 1872, they owed \$1,875 for the rent, and the landlord commenced proceedings to dispossess them. On the 6th of May a petition in involuntary bankruptcy against M., B. & C. was filed, and an injunction was issued restraining the debtors and all other persons from interfering with the debtors' property, which was served on the landlord. A warrant of dispossession was issued in those proceedings, but was not executed, and on the 20th of May a formal injunction was served on the landlord, ordering him to refrain from any interference with the property of the bankrupts,

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except to preserve the same. The marshal, on May 6th, took possession, under the warrant, of the bankrupts' stock of goods, on the premises in question. On May 22d, 1872, the landlord applied to the bankruptcy Court for a modification of the injunction, so as to allow of the execution of the warrant of dispossession. The application was denied. No application was made to the Court to order the removal of the goods from the premises, but the marshal was applied to to give up the premises, and also to pay rent, but he refused to do either. He remained in possession of the premises till December 13th, 1872. The landlord now applied to be paid rent of the premises at the rate of \$7,500 for the whole period, stating that he had had an offer of that sum for the premises, for the unexpired term of the lease, and that the premises were worth that sum : *Held*, That the landlord was not entitled to claim rent at the rate of \$7,500 for the period, but was entitled to a reasonable compensation for the use and occupation of the premises.

BLATCHFORD, J. On the 26th of December, 1871, the firm of Bailey & Debevoise leased to the bankrupts, who composed the firm of Metz, Brothers & Cleve, for the term of three years and one month from the 1st of January, 1872, for the yearly rent of \$7,500, payable monthly, not in advance, the store and basement of the building numbers 353 and 355 Canal street, in the city of New York. Metz, Brothers & Cleve made only one of the monthly payments, and, on the 1st of May, 1872, owed the lessors, for rent, \$1,875, which remains unpaid. Prior to May 6th, 1872, Bailey & Debevoise instituted proceedings, in a local Court, to dispossess the bankrupts for the non-payment of such rent. On the 6th of May, 1872, a petition in involuntary bankruptcy was filed in this Court against the bankrupts, and an order to show cause was on the same day issued thereon, returnable May 18th, 1872. This order contained a clause of injunction restraining the debtors and all other persons from disposing of the debtors' property and interfering therewith until the further order of the Court. A copy of this order was served on Bailey & Debevoise, on the 17th of May, 1872. Prior to the 20th of May, 1872, a warrant had been issued, in the dispossession proceedings, to the proper officer, directing him to remove the bankrupts from the premises in question, but such war-

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rant was not executed. On the 20th of May a formal injunction, issued by this Court, and bearing date the 18th of May, and addressed to the debtors and to Bailey & Debevoise, and commanding them to refrain, until the further order of the Court, from making any transfer or disposition of any of the property of the debtors, and from any interference therewith, except to preserve the same, was served on Bailey & Debevoise. The debtors had appeared on the return day of the order to show cause, and the matter was adjourned for a week.

Simultaneously with the issuing of the order to show cause, a provisional warrant was issued by the Court to the marshal, under section 40, under which he, on the 6th of May, 1872, took possession of the stock of goods of the debtors, which was in and on the premises in question. He did not remove such stock of goods, but left it there.

On the 22d of May, 1872, Bailey & Debevoise presented a petition to this Court, setting forth the lease and its terms, the indebtedness of \$1,875 for rent, the institution of the dispossession proceedings, the issuing of the warrant therein for the removal of the debtors from the premises, the institution of the bankruptcy proceedings, the issuing and the service, on Bailey & Debevoise, of the order of May 6th, 1872, containing the injunction clause before mentioned, and the service of the formal injunction, on the 20th of May. The prayer of such petition was, that the injunctions might be so modified or altered, that Bailey & Debevoise might be allowed to execute and enforce such warrant of removal. On this petition an order was asked that the petitioning creditor show cause why the prayer of the petition should not be granted.

Such petition of Bailey & Debevoise did not set forth that it was possible to remove the stock of goods from the premises, so as to give the enjoyment of the possession of the premises to Bailey & Debevoise, without in-

jury to the stock of goods, nor did it ask this Court to direct the marshal to remove the goods from the premises, with a view to allowing Bailey & Debevoise to obtain possession of the premises under the dispossession proceedings. The order and the injunction of this Court in no manner restrained Bailey & Debevoise from executing the warrant of removal, except in so far as it restrained them from interfering with the property of the debtors. The removal of the goods, then in the custody of the marshal, on the premises, was necessary to the full enjoyment of the possession and use of the premises by Bailey & Debevoise. The occupation of the premises by the marshal was the occupation of them by this Court. The debtors were not in the actual occupation of the premises, although, as between them and the lessors, having the technical legal possession of the premises. The prayer of the petition of Bailey & Debevoise was, that the injunction, which did not, in this regard, affect Bailey & Debevoise, except as it restrained them from interfering with the property of the debtors, might be so modified that they might execute such warrant of removal. This was, in effect, asking that they might interfere with the property of the debtors, in executing such warrant of removal, and might themselves, by means of such warrant, remove such goods from the premises. So far as a formal, technical removal of the debtors from the premises, personally, and as tenants in actual occupation under the lease, was to be effected by the execution of such warrant of removal, the injunction did not need to be modified. It needed to be modified only for the purpose of dispossessing the marshal and removing the stock of goods from the premises, so as to give back the actual use and occupation of the premises to Bailey & Debevoise. In this view, no sufficient reason was shown for modifying the injunction, as no sufficient reason was shown for directing the marshal to remove the goods and vacate the

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premises. Therefore, this Court declined even to grant the order requiring the petitioning creditor to show cause, that was asked for on the petition of Bailey & Debevoise.

A landlord who lets premises to a tenant to be occupied for purposes of trade, must be held to do so with the full understanding that the tenant may be proceeded against in bankruptcy, and that the bankrupt Court may be called upon to take possession of the goods of the tenant on the premises. In many cases, it will be impossible to remove the goods before a sale of them, without great loss and injury. In other cases, it will be impossible, because unjust to the debtor, to sell them before adjudication, and the adjudication may be delayed. Therefore, merely setting forth such facts as Bailey & Debevoise set forth in their petition, furnished no ground for directing the marshal to remove the goods and leave the premises.

The debtors were adjudicated bankrupts on the 7th of August, 1872. An assignee of their estate was appointed on the 23d of December, 1872. The goods remained on the premises, in the custody of the marshal, and the marshal remained in occupation of the premises, in custody of the goods, until the 13th of December, 1872, at which time Bailey & Debevoise obtained possession of the premises. Prior to that time they made to this Court only the one application before mentioned. They now apply to be paid, out of the assets of the estate, the sum of \$4,520 81, as rent of the premises from the 6th of May, 1872, to the 13th of December, 1872, at the rate specified in the lease, \$7,500 per annum.

Bailey & Debevoise show that while the marshal was in possession they applied to him to give up the possession to them, and also applied to him for rent, but that he did not comply with either request. But they made no application to this Court after the adjudication.

They also now state that while the marshal was in occupation they received an offer for the hiring of the premises for the remainder of the term under the lease to the bankrupts, at the rent of \$7,500 per annum, and that that was a fair and proper rent for the premises. But they never made known to the Court their ability to rent the premises for that sum, or laid before the Court such a state of facts as would have enabled the Court to determine with propriety, in advance, that rent at that rate ought to be paid in preference to removing the goods elsewhere. Nor do they now show that it was necessary for the goods to remain on the premises, at such an expensive rent. Certainly, there is nothing to warrant the presumption that the Court would have sanctioned, in advance, so large a rent.

Before adjudication, the debtors were entitled to be heard on the question of removing their goods from the premises, or of selling them on the premises, with a view to giving up the premises. And it may very well be that an application made to this Court in May, 1872, to direct the marshal to remove the goods from the premises, or to sell them on the premises, made on notice to the debtors, as well as to the petitioning creditor, would have been granted, if it had appeared that the alternative would have been the rent now asked, or, if denied, would have been denied on the full understanding that the sum to be paid for the occupation of the premises by the marshal, was to be at the rate of \$7,500 per annum. Bailey & Debevoise were themselves general creditors for their \$1,875 of unpaid rent, and in a position to make such an application.

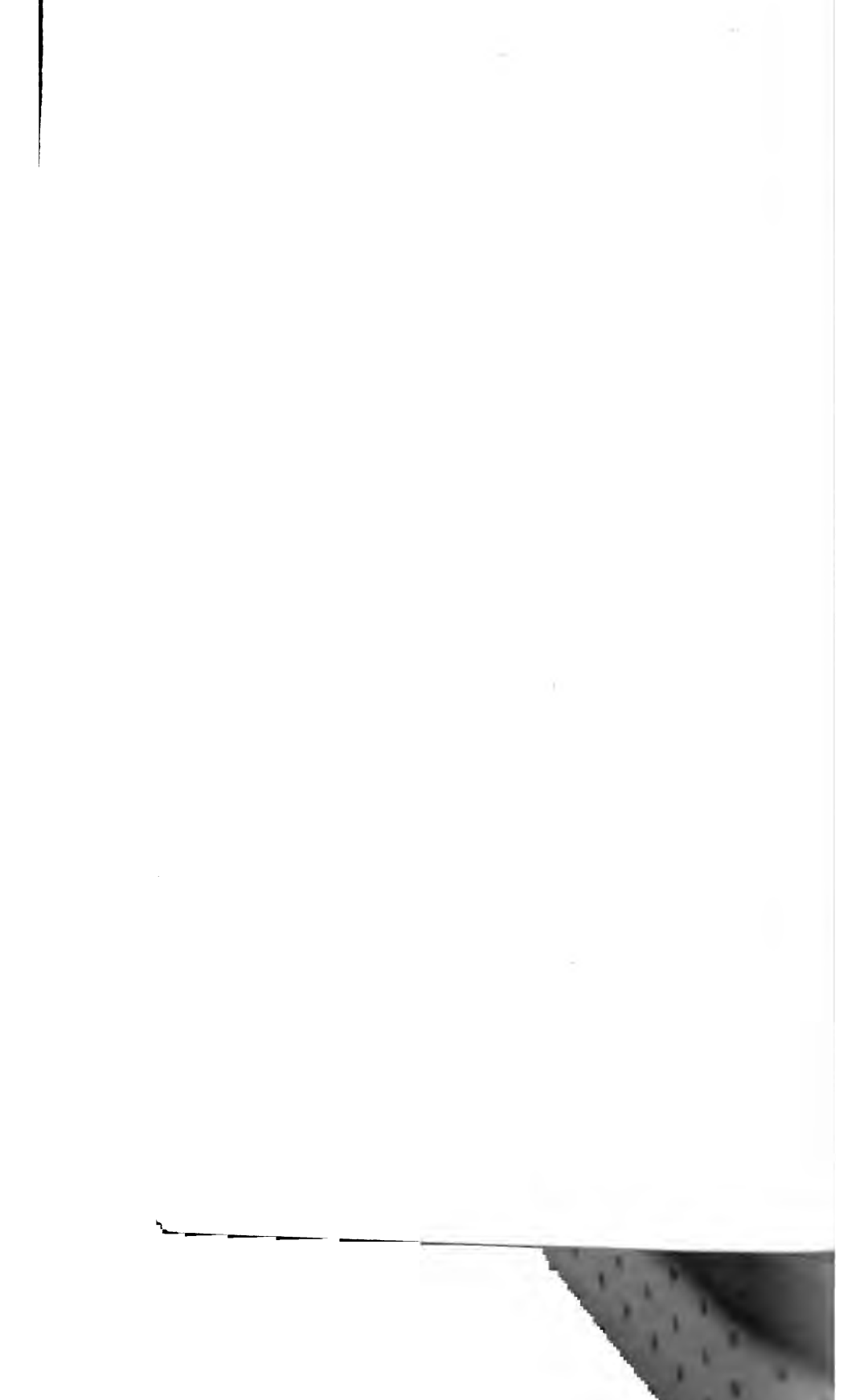
But, most clearly, after the adjudication, it was the duty of Bailey & Debevoise to have asked the Court to sanction the rate of rent they now ask, or to give up the premises. It was not enough for them to ask possession or rent from the marshal. He was the officer of the Court, acting under the warrant. It cannot be pre-

sumed, and there is nothing to show, that, if a proper application had been made to the Court, the Court would not, at an earlier day, have ordered the marshal to remove the goods and leave the premises. The application that was made, was made four days after the return day of the order to show cause, the hearing on such order having been adjourned for a week, and fell far short of making out a case for the action of the Court to remove the marshal and the goods; and the making of such application can carry with it no implication of any right in the applicants thereafter to receive rent at the rate of \$7,500 per annum, so long as the marshal should remain on the premises.

But, the applicants are entitled to receive a reasonable compensation for the use and occupation of the premises, based upon the considerations hereinbefore set forth, and any others properly bearing on the question. The assignee is directed to make a formal answer to the petition, setting forth such facts and positions as he may deem proper for the protection of the estate, and the matter may then be brought before the Court, on notice, for further action.

J. J. Marrin, for the applicants.

W. F. Scott, for the assignee.



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A

ACCOUNT.

See JURISDICTION, 1.

ARREST.

An action of debt was brought against a foreign consul, for money received in a fiduciary capacity. The defendant, being arrested, moved on affidavits to vacate the arrest:

Held, That, under the Act of February 28th, 1839 (5 *U. S. Stat. at Large*, 321), in connection with the Act of January 14th, 1841 (*Id.* 410), and the 179th section of the New York Code of Procedure, the defendant was liable to arrest in the action;

That, under the 5th section of the Act of June 1st, 1872 (17 *U. S. Stat. at Large*, 197), the plaintiff had the right, under the 205th section of that Code, to oppose the defendant's affidavits by affidavits in addition to those on which the arrest was granted. *McKay v. Garcia*, 556

ASSIGNEE.

See BANKRUPTCY, 10, 16.

ATTACHMENT.

See ESTOPPEL.
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B

BANKRUPTCY.

1. P. & Co., being insolvent and knowing their condition, within four months before the filing of a petition in bankruptcy against them, paid, through their recognized and authorized agent, to S., \$4,500, being a debt due to S., and payable on call. The assignee in bankruptcy of P. & Co. brought an action at law to recover back the money:

Held, That, this payment having been made in the ordinary course of business, under proper general authority, and not prevented or repudiated by P. & Co., they being in the habit of having these payments made through these agencies, to individuals occupying the position of S., the only question for the jury was, whether S., in receiving this payment, had reasonable cause to believe that P. & Co. were insolvent at the time, and had reasonable cause to believe that this payment to him was made with a view that he should have a preference in respect to this \$4,500;

That, the payment having been made in the establishment of P. & Co., out of the money of, and by the recognized agent of, P. & Co., they being insolvent and not stopping the making of the payment, and the payment having had the effect to produce a preference in favor of S., the jury were bound to conclude, under the law, that the payment was made by P. & Co. with a view to give a preference;

That if S., at the time he received

this payment, had reasonable cause to believe that the firm of P. & Co. was then in such a condition that it was about to stop payment of its debts, for want of money with which to pay them as they matured, in the ordinary course of business, then he had reasonable cause to believe that the firm was insolvent, in the sense of the bankruptcy Act, even though it had not actually stopped payment of its maturing obligations. *Seagwick v. Sheffield*, 21

2. Under the amendment to the 39th section of the bankruptcy Act, passed July 14th, 1870 (16 *U. S. Stat. at Large*, 276), even if the suspension of payment of commercial paper has continued for fourteen days, yet a *bona fide* denial of liability on the paper in respect to which the suspension occurs, is such an adequate legal excuse that the party ought not to be adjudged a bankrupt solely for suspending for fourteen days on the paper, even though, on investigation, the bankruptcy Court may be of opinion that, in fact, the debtor was liable on the paper. *The Hercules Life Assurance Society's Case*, 35

3. A mercantile firm gave promissory notes as vouchers or memorandums, in exchange for notes of like amounts simultaneously given to them, but not as obligations to be paid at maturity. They did not pay them when they became due on their face, entertaining a *bona fide* belief that they had a good defence to them. The party to whom they were given filed a petition in bankruptcy against the firm:

Held, That the notes were not commercial paper, as between the firm and the petitioner;

That, even if they were such, the refusal of the firm to pay them, entertaining the belief which they did, was not an act of bankruptcy. *Westcott's Case*, 135

4. An insurance company, which had issued a policy, and received the promissory note of the assured for the premium, dated April 1, 1871, became insolvent on October 9, 1871. The note passed into the hands of the assignee in bankruptcy. On the 13th of October, 1871, the assured surren-

dered the policy. After the note became due, they petitioned for an order directing the assignee to receive, in full of the note, an amount proportionate to the time the note had run before the surrender of the policy.

Held, That the petitioners were not entitled to any return of premium, or to any deduction from their note. *The Western Ins. Co.'s Case*, 159

5. A petition in involuntary bankruptcy having been filed against P., an injunction was issued, which was served on him on December 6th or 7th, 1871, restraining him from making any disposition or transfer of his property. A subsequent petition was filed against him, the only act of bankruptcy alleged being the non-payment, for fourteen days, of a promissory note, which matured November 29th, 1871:

Held, That, as the injunction on the first petition was in force when the second was filed, the debtor could not be said to have stopped or suspended, and not resumed payment for fourteen days, of the note in question. *Pratt's Case*, 165

6. A claim by a broker, who had made contracts as the agent of the bankrupt, but in his own name, for the purchase of goods, which contracts the bankrupt refused to carry out, whereupon the broker settled them at a loss, to recover against the bankrupt the amount of such losses and of his brokerage, is a claim for unliquidated damages, and the proof of it, as a claim against the bankrupt's estate, is to be disallowed. *Smith's Case*, 187

7. Money delivered to a bankrupt in trust, if ear-marked, or separately kept and retained as trust property to be delivered or paid over in the same bills or coin in which it was received, would not pass under an assignment in bankruptcy, but would be considered as "trust property;" but an amount of money due from the bankrupt, as a trustee, and which could not be distinguished from any other moneys in his possession or under his control, or which was only due from him because he had used trust funds for his own purposes, cannot be considered as "property" held by the bankrupt in trust. *Hosmer v. Jewett*, 208

8. On the 7th of December, 1871, a petition in involuntary bankruptcy against D. was filed by S., who alleged, as the act of bankruptcy, the making by D. of a chattel mortgage to B. A. & W., on November 14th, 1871, he being then insolvent. D. was adjudged a bankrupt, and an assignee was appointed. On the 1st of December, 1871, an action was commenced in a State Court by P., as guardian *ad litem* of D., as an infant, against B. A. & W., to recover for an alleged conversion by them of the goods covered by the chattel mortgage. The assignee in bankruptcy, after his appointment, filed a bill in equity against B. A. & W. to recover for the alleged conversion of the same goods. Thereupon B. A. & W., in April, 1872, filed a petition in the bankruptcy Court, praying that the adjudication of bankruptcy against D. might be set aside, alleging, among other things, that D. was an infant when the petition was filed against him, which fact was, on a reference, established to be true. On the hearing, D., who had now become of age, presented a petition praying, among other things, for the confirmation of the bankruptcy proceedings against him:

Held, That B. A. & W. were in a position to entitle them to ask the interposition of this Court to vacate the adjudication;

That, as D. was an infant at the time of the filing of the petition, the Court had no jurisdiction to make the adjudication;

That the petition filed by D., after he came of age, for a confirmation of the bankruptcy proceedings, could not give the Court jurisdiction;

That, as D. was an infant, the giving of the mortgage to B. A. & W. was not an action of bankruptcy, because it was not an absolute transfer, but was subject to his election to affirm or disaffirm it when he came of age:

That the adjudication, and all the proceedings had thereupon, must be vacated. *Derby's Case*, 232

9. M., who was a man of large property, refused to pay a note which he had made, being advised by counsel, and believing, that he had a valid defence against it. A suit was thereupon

brought against him, in a State Court, by the holder of the note; and, while that suit was pending, the holder of the note filed a petition against M. in involuntary bankruptcy, alleging that he had suspended payment of the note for fourteen days:

Held, That the case was not a proper one for an adjudication of bankruptcy, and that the petition must be dismissed. *Mannheim's Case*, 270

10. In March, 1869, the firm of R. B. & A. made an assignment to M., of all their property in trust for all their creditors. In April, 1869, a petition in bankruptcy was filed against them, and they were adjudged bankrupts. An injunction was issued against M., to prevent his selling the assigned property. The assignee in bankruptcy commenced a suit against M. to set aside the assignment to him, and compel an accounting by him. In May, 1870, the injunction against M. was modified so as to allow him to sell parts of the property. In May, 1871, on final hearing, a decree was made setting aside the assignment to M., and directing an accounting, which was had. On the report of the master, exceptions were filed by the plaintiff to various allowances to M., as reported:

Held, That the effect of the decree was to declare the transfer to M. to have been void, and to substitute the title of the plaintiff for any title in M., as of the day of the filing of the petition;

That M., therefore, could not be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer, or to maintain his title or possession thereunder;

That, in so far as M. acted with the permission of this Court in making sales of the property, he ought to be allowed such expenses as were necessary and proper in so acting;

That, as the plaintiff furnished no evidence as to any definite loss or depreciation of the property, by reason of the interference of M. with it, or that its value was greater than the price it brought on sale, the Court could not speculate as to what such loss was. *Clark v. Marz*, 275

11. Bankrupts occupied land under a

lease, in which they covenanted to pay the taxes on the land. They failed to pay them, and the lessors paid them:

Held, That the lessors were not entitled to claim the amount of such payment, as a preferred debt, under the 28th section of the bankruptcy Act. *Parker & Peck's Case*, 286

12. A debt, founded on a judgment against the two members of a firm jointly, in a suit on a partnership note, does not entitle the creditor to dividends out of the separate estate of each member of the firm, on an equal footing with the separate creditors of each member. *Berrian's Case*, 297

13. Where the separate estate of one of the partners was more than sufficient to pay the separate debts of such partner, with interest added up to the day of the adjudication, but there was not sufficient to pay the creditors of the firm:

Held, That the separate creditors were not entitled, as against the joint creditors, to be paid interest on their debts for the period subsequent to the adjudication. *Id.*

14. S. hired premises of H., in 1865, for five years. He surrendered the lease in May, 1868, and the landlord agreed with him to rent the premises, S. to pay any deficit in the rent. There was a deficit, and in May, 1871, H. obtained judgment against S. for such deficit. S. becoming a bankrupt, H. proved the judgment as a debt against the estate, and filed specifications in opposition to his discharge. S. had no assets, and did not obtain the consent of creditors, provided for in the 33d section of the bankruptcy Act, as amended on July 27th, 1868 (15 *U. S. Stat. at Large*, 228):

Held, that the debt was contracted prior to January 1st, 1869, within the meaning of the Act of July 14th, 1870 (16 *Id.* 276). *Swift's Case*, 324

15. A corporation was dissolved by a State Court and a receiver appointed. More than six months after, the receiver collected a claim of the corporation from a debtor by legal process:

Held, That such collection was not a taking of the property of the corporation on legal process, in the sense of

the bankruptcy Act. *The New Amsterdam Fire Ins. Co.'s Case*, 368

16. S. & P. recovered judgment against O., on which execution was issued, and the sheriff levied on his stock of goods. The next day, O. filed a voluntary petition in bankruptcy. A. was appointed assignee in bankruptcy. An injunction was issued restraining the sheriff from selling under the levy. This injunction was afterwards modified so as to allow the sheriff to sell and hold the proceeds in place of the goods. This was done, and at the sale A. bought in the goods for the creditors at \$2,650. He then brought suit against S. & P. to recover the goods or their value. He testified that the creditors had the option of taking the goods at the \$2,650, but did not take them, and he took them himself; and that he thought that competent parties would appraise the goods at \$6,800. It appeared that S. & P., at the time of the entry of the judgment, knew O. to be a bankrupt:

Held, That A. was entitled to recover the goods or their value, and that the order modifying the injunction afforded S. & P. no defence:

That they were liable, however, only for the \$2,650 which the goods brought at the sheriff's sale. *Anderson v. Strassburger*, 373

17. R. filed a voluntary petition in bankruptcy on August 14th, 1871, and was on that day adjudged a bankrupt. On October 3d, 1871, the United States brought a suit against him to recover penalties for alleged violations by him of the internal revenue laws, in selling, in April, 1871, cigar lights in packages without tax stamps, contrary to the 185th and 169th sections of the Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 296, 302), as amended by the 8th section of the Act of July 13th, 1866 (14 *Id.* 144). The bankrupt appeared in the suit, but put in no defence, and on February 2d, 1872, the United States recovered a judgment against him for \$5,081 68. Afterwards a proof of debt was filed on behalf of the United States, in the bankruptcy proceedings, founded on the judgment, and the United States claimed to be paid in full, by priority, under the 28th section of the bank-

ruptcy Act. The assignee applied to the register for a re-examination of the claim, and testimony was taken, and the register certified to the Court the question whether the claim was a valid and provable claim, and whether it was entitled to a priority of payment:

Held, That the bankrupt had incurred the penalties in April, 1871, when the cigar lights were sold without the stamps;

That the claim was a provable debt, for so much of the judgment as did not consist of costs of the suit, and that for that amount the United States was entitled to a priority of payment.
Rosey's Case, 507

18. B., before he became bankrupt, hired premises, and afterwards sold out his business to his brother, and surrendered the premises to him, but still paid the rent, and afterwards directed the landlord to relet them, as he was not able to pay the rent, and agreed to be accountable for the rent till they were relet:

Held, That a proof of debt for the rent till the premises were relet was valid. *Bruce's Case*, 515

19. B. also agreed to furnish money to H., to take out a patent, and to pay the expense of taking it out, and received an interest in the patent. Thereafter a note made by H., and indorsed by B., was given to J., for work done as a chemist on the patent:

Held, That J. could prove the note as a valid claim against the estate of B. *Id.*

20. A claim of debt was offered by the petitioning creditors against B.'s estate, founded upon a judgment. It appeared that, subsequent to the presentation of the proof of debt, the Court in which the judgment, which was entered on an inquest, was obtained, had opened the inquest and set aside the judgment.

Held, That the proof of debt must be expunged. *Id.*

See BOND, 1.

INFANT.

INJUNCTION.

LIMITATION OF SUIT.

PLEADING, 3.

PRACTICE IN BANKRUPTCY.

WILL.

BILL OF LADING.

1. A vessel took on board at Norfolk, Va., a quantity of pine wood, and her master signed a bill of lading, which described the wood as being "112½ cords pine wood, Norfolk inspection," and agreed for its delivery at New York on payment of freight "at four dollars per cord." The vessel arrived in New York, where the consignee refused to pay \$450 for the freight, but insisted that the cargo should be discharged and measured, and that freight should be paid only at the rate of \$4 per cord on such measurement. The wood was then discharged by the vessel, and deposited in a proper wood-yard, of which the consignee had knowledge. He filed a libel against the vessel to recover the value of the wood, alleging that the master had sold it and converted it to his own use:

Held, That, on the bill of lading, the vessel was entitled to receive the \$450 as freight;

That she delivered all the wood she took on board at Norfolk;

That it was not made to appear by the libellant, that the master had sold and converted the cargo, and that the libel must be dismissed. *The Defiance*, 162

2. The master of a vessel, which had been driven ashore by a peril of the sea, and got off, being unable to raise money to pay the salvage claims, sold a portion of the cargo for that purpose:

Held, That the vessel was not liable for non-delivery of such cargo, under the bill of lading;

But that, as the owners of the vessel offered to pay the amount of their contribution in general average, the holders of the bill of lading might recover such amount, in this action on the bill of lading. *The Wiley Smith*, 196

3. A bill of lading was executed at Malta, on January 2, 1872, acknowledging the receipt there, in good condition, of eighty-five boxes of oranges for shipment to Liverpool, "to be there reshipped on board a Cunard steamer or steamers bound for New York, via Queenstown and (or) Boston," to be there delivered in like good order and

well conditioned, on payment of certain freight. It also contained a clause that the goods were "to be taken from alongside by the consignee, immediately the vessel is ready to discharge," or they would be landed and deposited in a warehouse or sent to public store. On the 2d, 3d, or 5th of February, 1872, the consignee named in the bill of lading sent his agent with the bill of lading to the office of the Cunard Steamship Company in New York. He showed the bill of lading to the clerk having charge of the department of inward freight, and asked if the goods named in it had arrived. He was told that they would probably arrive by the *Russia*, which was to sail from Liverpool on February 3d, and that, on the arrival of any steamer, a list of the cargo and consignees of goods on board of her, was published in the *Journal of Commerce*. The consignee inspected that list on the arrival of the *Russia*, and not finding his name, sent again to the office, and was told that the goods had not come by the *Russia*, but, if they were coming, would come by the next steamer. On the arrival of that steamer, his goods were not on her, and he sent again to the company's office, and was then told that the goods had arrived by the *China*, which came on the 1st of February. Her cargo list had been published on the 3d of February, and on the 5th of February the goods had been sent to the public store under a general order. Before the consignee learned these facts, and applied for his goods, they had been sold to pay storage. The consignee filed a libel against the company to recover their value:

Held, That the publication of the cargo list of the *China* was not such a notice to the consignee as is requisite to discharge a ship owner from liability under a bill of lading;

That, under such a bill of lading as this, which mentioned no vessel, and on such inquiry as the consignee made, it was the duty of the ship owners to have seen to it, that he was advised truly as to the arrival of his goods;

That the ship owners were therefore liable, on the bill of lading, for the value of the goods. *Caruana v. The British &c. Steam Packet Co.*, 517

4. A ship received on board, in Havre, a number of millstones to be carried to New York, under a bill of lading containing the clause "not accountable for breakage." On the delivery of the stones, four were found to be broken, and two others never came to the possession of the consignees, who brought an action against the owners of the ship to recover the value of the six stones:

Held, That it was incumbent on the owners of the ship, at least, to show that the two missing stones were discharged upon the wharf and placed with the others in that part of it which had been selected for the deposit of the libellant's goods;

That, as the respondents had not furnished such proof, they were liable for the value of the missing stones;

That it was not made to appear that there was any negligence in stowing or landing the stones, and, under the bill of lading, the respondents were not liable for breakage not shown to have arisen from negligence. *Carey v. Atkins*, 562

See CHARTER, 1.
FREIGHT.

BOND.

1. A bond issued by an individual, under seal, with coupons attached for the payment of the interest semi-annually, payable to bearer, and secured by a mortgage of real estate to trustees, is a negotiable instrument, and not a specialty, so as to be subject, in the hands of an assignee, to equities existing against the assignor.

L. had issued a series of such bonds, which, after his bankruptcy, were found in the possession of a certain bank. In a reference, ordered at the instance of the assignee, a witness was under examination, to whom questions were put relating to the original consideration of the bonds. He refused to answer, and an application was made to the Court to compel him to answer:

Held, That, as the bonds in question were negotiable, and the bank appeared to be a *bona fide* holder for value, the original consideration could not be inquired into, and the witness need not answer. *Leland's Case*, 175

2. The execution of a bond, for a collector of internal revenue, by the sureties, with the date left blank, authorizes the principal to fill the blank at his discretion. *The U. S. v. Halsted*, 205

- Pritchard v. Chandler* (2 Curtis C. C. R. 488), 505
Sedgwick v. Casey (4 Benedict, 562), 498
McLean v. The Lafayette Bank (3 McLean, 185), 505

See PLEADING, 1.

BOTTOMRY.

The master of a vessel had taken up money on bottomry. On the arrival of the vessel at her port of destination, a libel was filed against her by the holders of the bottomry bond. The master also filed a libel against her, to recover a balance due him for his own wages and for advances of wages made by him to the crew. The proceeds of the vessel not being sufficient to pay both claims, an application was made to the Court to settle their priority, the bottomry holders claiming that the master was liable to them for any deficiency on the bond, and that he could not, therefore, claim a priority over them. The bottomry bond did not contain any covenant on the part of the master, binding him personally for the debt:

Held, That, in the absence of such an express covenant, the master would not, by the maritime law, be liable for a deficiency on the bond;

That, in respect to the bottomry holders and the master, their claims, in respect to order of payment, must be subject to the general rule, by which wages are entitled to be paid in preference to bottomry claims.
The Irma, 1

See CHARTER, 2.

BROKER.

See BANKRUPTCY, 6.

C

CASES CRITICISED.

- In re Crawford* (3 Bank. Reg. 171), 150
Mitchell v. Great Works Milling &c. Co. (2 Story, 648), 503

CHARTER-PARTY.

1. The owners of a vessel filed a libel against a cargo of guano, which had been brought in her, from Surrano Cay to New York, under a charter-party, to recover for demurrage in loading her, and in discharging, and to recover passage money, agreed in the charter to be paid by the charterer. Detention of the vessel in loading beyond the specified time was admitted, but the charterer claimed that it was caused by the master of the vessel, in that he, without cause, when she was partly loaded, changed the place of anchorage of the vessel to a greater distance from the spot where her cargo of guano was being loaded. On the arrival of the vessel in New York, the master refused, for several days, to sign bills of lading for the cargo, because the charterer would not admit the claim for demurrage in loading. The charterer also refused to pay the passage money, on the ground that the fare was so bad as to constitute a breach of the contract:

Held, That, on the evidence, the master was entitled to the presumption that he knew best where his vessel should anchor, and that his moving of his vessel was not, therefore, a defence to the claim for demurrage in loading;

That the master was not justified in refusing to sign the bills of lading, and the owners could not, therefore, claim demurrage during the time of such refusal;

That, on the evidence, the fare was sufficient to entitle the owners to the passage money. *Three hundred and ninety-three Tons of Guano*, 533

2. A bark was chartered for a voyage from New York to Montevideo, by a charter which contained the clause, "dangers of the seas, fire and navigation mutually excepted." The charterer put on board a full cargo

of lumber. On the day the loading was completed, a fire broke out on board, which made it necessary to fill the vessel with water. Both vessel and cargo were damaged, and the cargo had to be unloaded, but could have been carried forward in a damaged condition. In its damaged condition, it was worth in New York \$4,947 26, and the freight due on performance of the voyage under the charter, was \$5,105 29. The charterer offered to supply a new cargo, to be carried under the charter in lieu of the damaged one, but the master refused to give up the damaged cargo without payment of full freight. No offer was made to carry the cargo forward in any other ship. The ship was repaired at a cost exceeding her value when repaired; and the master, being without funds to pay for the repairs, which were liens on the vessel, advertised for a loan of \$17,000, which was more than the value of the bark and cargo, upon the security of the vessel, her freight and cargo. Thereupon the charterer demanded his lumber, and, on a refusal to surrender it, except on payment of full freight, filed a libel against the cargo for possession; and, by means of the process issued thereon, took the cargo from the possession of the master, and it was afterwards delivered by the marshal to the charterer, on a stipulation for value taken in Court, to return the cargo or pay whatever the Court should decree the ship to be entitled to receive by reason of the removal of the cargo. The master also filed a libel against the charterer to recover the full freight and the average charges:

Held, That the charterer was entitled to have substituted a sound cargo in place of the damaged cargo; and that the refusal of the master to accept the substituted cargo thus tendered, entitled the charterer to treat the charter as broken by the ship, and to demand the damaged cargo without payment of freight;

That the act of the master in advertising for such a loan on the credit of the cargo, as well as of the ship and freight, was without authority, and authorized the charterer to treat the voyage as broken up by the fault of the ship; and it entitled him to de-

mand the cargo without payment of freight;

That the charterer, therefore, was entitled to a decree declaring him entitled to the possession of the lumber, with costs; and that the master's libel must be dismissed, with costs.
The Luteken's Cargo, 565

CHATTEL MORTGAGE.

A chattel mortgage was given by C., who was afterwards adjudged a bankrupt. The assignee in bankruptcy having sold the property, the mortgages petitioned to be paid the proceeds, in satisfaction of the mortgage. It appeared, that an agreement was made, contemporaneous with the mortgage, that the mortgagor should retain possession of the mortgaged property, make sales of it from time to time as he might desire, and receive the proceeds for his own use. The debt for which the mortgage was given was an actual one, and unpaid:

Held, That, under the laws of the State of New York, the mortgage was void, and the petition must be denied.
Cantrell's Case, 482

COLLECTOR.

See BOND, 2.

COLLISION.

1. STEAMBOAT AND SCHOONER.

1. A schooner, bound to New York, was beating through the East river against a light southwest wind, the tide being ebb, about midnight of July 18th, 1871. She alleged that, having fully beat out her tack, she was in stays close in under Negro Point Bluff, on Ward's Island, when a steamboat, bound from New York, ran into her, striking her on her port bow a blow, angling aft, which sank her. Both vessels had the regulation lights set, and both had lookouts stationed forward. The story of the steamboat was, that, as she rounded Hallett's Point, she saw the schooner's red light off her starboard bow; that shortly afterwards she saw both lights of the schooner, then about a quarter or a

half a mile off; that very soon afterwards the schooner's red light disappeared, the green light remaining visible, whereupon the steamboat's wheel was starboarded to go under the schooner's stern, and her engine slowed; that thereafter the red light suddenly came into view again, indicating that the schooner had changed her course; and that thereupon the steamer stopped, but too late to avoid a collision:

Held, That, on the evidence, the pilot of the steamer mistook the distance he was from the schooner, when he starboarded to go between her and Ward's Island, and was then too near her to allow time for the schooner to get off on the other tack;

That the schooner made no change back to the port tack after having come about on the starboard tack;

That, although the schooner's jib was held up so as to keep her in stays, yet that did not contribute to the collision, and was done in the extreme peril and alarm consequent on the close approach of the steamboat head on;

That the steamboat was solely liable for the damages. *The Elm City*,
58

2. A steamer, bound to the westward, discovered the flash lights of a pilot boat to the northward, about abeam. She replied to them, indicating that she wanted a pilot, and changed her course to N.W. by N. The pilot boat changed her course to the southward and westward to meet the steamer, showing her torches as she proceeded. The wind was fresh. When the vessels were four or five lengths apart, the courses of the vessels were crossing, and the starboard side of the steamer was the lee side. She showed a light on that side to guide the pilot to his place, and a pilot left the pilot boat in a yawl, having with him a light, to board the steamer. The steamer was kept in motion, and starboarded her helm, and, before the yawl boat reached her, she ran into the pilot boat and sank her. The pilot boat had no masthead light, but the light, which the pilot carried as he went into the yawl, was seen by those in charge of the steamer:

Held, That the steamer was in fault,

in not stopping still before she reached the pilot boat, and also in starboard-ing her helm;

That the burden was on the pilot boat of proving that the absence of the masthead light, which she should have carried, did not contribute to the collision;

That, as the exact position of the pilot boat was known to those in charge of the steamer, and as the absence of the masthead light was not set up in the answer of the steamer as an act of negligence, the absence of the masthead light did not contribute to the collision, and the steamer must be held solely liable. *The City of Washington*,
138

3. A propeller, bound to New York, was coming through Hell Gate, with an ebb tide, in the day time. A schooner which was going through ahead of her came to anchor off Hallett's Point, and was struck by the propeller and sunk. The schooner alleged that the wind had died away, and that, finding she was in danger of drifting on Hallett's Point, she came to anchor, and had been at anchor several minutes before the propeller came in sight, and that the propeller could have avoided her by going on either side. The propeller claimed, that the schooner was slowly crossing the channel towards Ward's Island, when the propeller came to Negro Point, and that she there took her course to go under the schooner's stern, and between her and Hallett's Point, and that, when she was within five or six hundred feet of the schooner, the latter suddenly came to anchor in midchannel, right ahead of the propeller, and when it was too late for the propeller to avoid her:

Held, That the weight of the evidence sustained the defence of the propeller;

That, even if the schooner was in peril of going on the rocks, by reason of the dying away of the wind, which led her to anchor when she did, she voluntarily threw upon herself the greater danger of anchoring in a narrow and dangerous tide-way, in the course of the propeller coming with the tide;

That the anchoring of the schooner took place at a time and in a position

when and where the propeller, discovering the fact as soon as she ought to have discovered it, could not avoid the schooner, and that the propeller was not liable for the damages. *The Electra*, 189

4. On the night of August 25th, 1871, the Norwegian barque *Anitas* was sunk by a collision with the steamer *Java*, at sea. Of the twelve persons on board of her, only one was saved, and he was below, and did not come on deck till after the collision. The steamer was going at the rate of ten knots an hour, and the night was dark, with a drizzling rain. The weight of the evidence for the claimant, however, was, that the hull of a vessel could be seen a quarter of a mile. The lookout on the steamer saw a white light about a point on her starboard bow, which, he said, disappeared, and he then saw a good red light. The engine of the steamer was stopped and reversed, but she struck the barque stem on, on her port side, a square blow:

Held, That, if the night was a thick night, with a drizzling rain, the speed of the steamer was too great; and if, on the other hand, the hull of a vessel could have been seen a quarter of a mile, and the steamer could be stopped in less than a quarter of a mile, then the steamer failed to see the barque as soon as she ought to have been seen;

That the steamer had failed to establish that the barque did not have a red light set, or changed her course improperly, which was the only fault she alleged against the barque, and she was, therefore, solely liable for the collision;

Where a vessel is found to have been in fault in a collision, especially where, as here, the effect of the collision was to destroy all the persons on the other vessel who could have given evidence as to her lights, clear and satisfactory proof is required of the absence of such lights, to inculcate such other vessel in reference to the lights. *The Java*, 245

5. A schooner was sunk, in Long Island Sound, by a collision with a ship which was at the time being towed at the end of a hawser, by a tug. The night was bright moonlight. The wind was light, from a little west of

south, and the schooner was heading about northeast, and going at the rate of from two to three knots an hour. The ship and tug were heading about southwest. The schooner saw the ship and tug a little on her port bow at first, but the tug crossed to her starboard bow when a short distance ahead, and the schooner, keeping on her course, came against the hawser by which the tug was towing the ship, and was then struck on her port side by the ship's stem. The tug was towing the ship at the rate of about seven miles an hour. The ship and tug claimed that the course of the schooner was parallel to theirs, and that, just as she passed the stern of the tug, she ported her helm and so came across the hawser and between the tug and ship, and thus caused the collision. The ship was under the charge of a pilot, who was on board of the ship, but he gave no order to the tug. The hawser by which the ship was towed was about two hundred and fifty feet long:

Held, That the ship must be regarded as a ship under steam at the place of collision, because she was moving by steam alone, and her steam power, though two hundred and fifty feet away, was so by her option;

That it was, therefore, the duty of the schooner to keep her course, and the duty of the ship to keep out of her way;

That, on the evidence, the courses of the vessels were nearly end on, and yet drawing across each other, the tug and ship drawing across the course of the schooner from port to starboard;

That the burden was on the ship to establish that the schooner changed her course;

That, on the evidence, the schooner did not change her course;

That, in the absence of any special instructions from the pilot who was in charge of the ship, to the tug, as to what was to be done on the approach of the schooner, it was the duty of the master of the tug to take care so to navigate the tug and the ship as to avoid a collision between either and the schooner;

That both ship and tug were, therefore, liable. *The Civitta and the Restless*, 309

6. A steamer and a schooner came in collision at night in Long Island Sound. The wind was southwest, and the schooner was heading east, and making nine or ten knots an hour. The steamer was heading west by south, making five or six knots an hour. The schooner made no change in her course. When the lights of the steamer were first seen a little on the starboard bow of the schooner, the latter showed a torchlight on that side, and afterwards showed it again shortly before the collision. The master of the steamer saw the torchlight, a little on the port bow of the steamer. He also, at the same time, saw a red light and several bright lights apparently on a steamer on his port hand. He ported for a little time, and then straightened up on his course again, and, on seeing the torchlight again on his port bow, ported again, as he said, because the pilot whom he had on board said it must be on a pilot boat, and he did not wish to be spoken; and, on the re-appearing of the torchlight a third time, still on his port bow, he put his helm hard a-port and stopped his engine, and then, seeing the schooner's green light, reversed it, but too late to avoid the schooner, which was struck on her starboard side and sunk:

Held, That the steamer was bound to have kept out of the way of the schooner;

That the steamer was in fault in porting on first seeing the torchlight but a little on her port bow, without anything to indicate which way the vessel showing it was proceeding, and in following up the schooner, as she did, by repeated portings, instead of starboarding or stopping until she found which way the schooner was going. *The Titian*, 346

7. A lighter bound from the East river to Jersey City, with the wind free, saw a tug coming down the North river, with a canal-boat alongside. The captain of the lighter, apprehending danger of collision, as he saw no movement on the part of the tug to avoid the lighter, kept away two points. A collision ensued, the canal-boat alongside of the tug striking the lighter on her starboard side, aft of amidships, and causing her to sink:

Held, That the lighter was in fault for changing her course, and was responsible for the collision.

When a change of course is admitted or established on the part of a vessel which is under obligation to keep her course as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former vessel is necessary.

The excuse for a change of course by such a vessel, that the other vessel was taking no steps to get out of the way, is not to be favored.

It is the actual danger of collision which determines the duties of both vessels, and not the apprehension merely. *The Gen. U. S. Grant*, 465

2. STEAMBOATS.

8. The steamboat S., coming down the East river, saw on her starboard hand the ferry-boat Q. lying in the river waiting to enter her slip, and heading down the river. The S. blew two whistles and kept on her course. The Q. started ahead, and swung in to go to her slip, across the course of the S., and both vessels kept on without stopping, till the S. was struck on her starboard side by the Q.:

Held, That both vessels were in fault, in keeping on, after each had been notified that the other was taking a course which made a collision inevitable, if both kept on. *The Queens County*, 146

9. Two steamtugs, the U. and the McC., were going down the East river, the U. being ahead. The McC. gained on the U., so as to lap her starboard side. A ferry-boat coming up behind them passed to the starboard of both tugs, and, as she was passing, the port bow or stem of the McC. came in contact with the starboard quarter of the U., and she shot off to starboard, across the bows of the McC., and struck the port side of the ferry-boat, receiving injuries, to recover for which a libel was filed, in her behalf, against the McC. No fault was charged by either party against the ferry-boat:

Held, That the case was one to which articles 17 and 18 of the Act of April 29th, 1864 (13 U. S. Stat. at Large, 61), apply. It was the duty of the McC.

to keep out of the way of the U., and the duty of the U. to keep her course;

That, as the evidence showed that the U. kept her course, it followed that the McC. was in fault;

That the U., having the right of way, and having no reason to suppose that the McC. would hit her, was not bound to slow, on the approach of the ferry-boat;

That, whatever mistake the U. made in not stopping and backing, was, at most, an error of judgment, under circumstances of danger brought about by the McC., and was not, therefore, to be imputed to the U. as a fault.
The Gen. Wm. McCandless, 223

10. A ferry-boat, bound from New York to Jersey City, left her slip, on an ebb tide, under a port helm in order to get a good offing, so as not to be carried so far down as to be below a proper point from which to reach her slip on the opposite side of the Hudson river. Out in the river, and below her, was a propeller, coming up the river and having the ferry-boat on her starboard hand. When the ferry-boat cleared the line of the piers, her pilot, perceiving the propeller, blew one whistle. Receiving no reply, he blew another single whistle, to which the propeller responded with a single whistle. The propeller immediately slowed, stopped and backed her engine and put her wheel hard a-port, while the ferry-boat kept on without slowing, till her pilot saw that the propeller would hit the ferry-boat, when he starboarded his helm, changing the course of the ferry-boat, but not contributing to the collision which ensued, the propeller striking the ferry-boat on the port side nearly amidships:

Held, That as the courses of the vessels were crossing, and the propeller had the ferry-boat on her starboard hand, it was the duty of the latter to keep her course, and the duty of the propeller to avoid her;

That the propeller had no right to suppose that, as the ferry slip on the Jersey side was lower down the river than the one on the New York side, therefore the ferry-boat would drop down the river, and go under the stern of the propeller, because, the course taken by the ferry-boat was the usual one on such a tide;

That the ferry-boat was not in fault in keeping on without slowing, especially under the signals given;

That the propeller was solely in fault for the collision. *The John Taylor,* 227

11. A tug, having several boats in tow, coming down the East river, on an ebb tide, rounded to to pick up another boat on the New York side, just above the Fulton ferry slip. A Fulton ferry-boat, coming out of that slip, came in collision with the stern boat on the port side. The ferry-boat claimed that, when she came out of the slip, the tug was going down the river, and that after the ferry-boat got headed up the river against the tide, the tug turned around across her course. Her pilot stated that, as soon as he saw her sheer, he rang a bell to slow the engine, and then to stop and back; and the engineer testified that he made four or five turns of the engine ahead, under the bell to slow, before he stopped and backed. The speed of the ferry-boat was nearly done at the collision, and she struck the boat about twenty-five feet from her stern. The owner of the boat filed a libel against both the tug and the ferry-boat, but the tug was not seized under the process. On the trial, a motion was made, on behalf of the ferry-boat, that the libellant be compelled to bring in the tug, or the libel be dismissed. The motion was denied, but the libel was directed to be amended by striking out the prayer for process against the tug. On the trial, one of the libellant's witnesses testified, that it looked to him as if the ferry-boat hit the boat intentionally. The owners of the ferry-boat claimed that she was not liable for the wilful tort of her pilot:

Held, That, on the story of the ferry-boat, when the tug had turned so as to be heading across the river, the courses were crossing, and the ferry-boat, having the tug on her starboard hand, was bound to avoid her and her tow, and when the tug had turned so as to head up the river, the ferry-boat was the following boat, and was still bound to avoid them;

That the ferry-boat was in fault in not stopping and backing at once, as soon as her pilot saw the tug turn, instead of keeping on under a slow bell;

That the act of the pilot of the ferry-boat was not wilful, in such sense as to relieve the ferry-boat from liability for the result of it;

That, although the libel was filed against both tug and ferry-boat, the libellant could recover against the ferry-boat alone, because there was independent fault on her part, and any fault in the tug in sheering was not a fault which contributed to the collision. *The Manhasset and The Hiram Perry*, 301

12. The tug W. D. R., going up the East river, made the green and red lights of the tug E. L. about ahead. The E. L. was coming down the river, and, on seeing the lights of the W. D. R., ported her helm. The W. D. R., wanting to run into a pier on the New York side, blew two whistles, and, without waiting for any reply, starboarded her helm. The two vessels came together, the stem of the W. D. R. striking the port bow of the E. L., and receiving such injuries that the W. D. R. sank:

Held, That the W. D. R. was in fault, in starboarding, and was solely responsible for the collision. *The Edmund Levy*, 371

13. A ferry-boat was crossing the East river from New York to Brooklyn. The tide being strong ebb, she went above her slip, to drop down with the tide. Her pilot saw a steamboat, heavily loaded, coming slowly up the river on his starboard hand, close in to the Brooklyn piers. He blew two whistles, indicating that he intended to go ahead of the other boat, although her position was such that he could not do so unless she changed her course. The whistles were not heard, and the steamboat kept on. Thereupon the ferry-boat stopped her engine, but did not reverse it, till the steamboat had proceeded so far as to strike a cross tide, which set her out from the piers. The pilot of the ferry-boat then reversed the engine, but too late, and the vessels came together. The pilot of the steamboat made no change in her helm, and stopped and reversed her engine as soon as he saw there was danger of collision:

Held, That the ferry-boat having the

steamboat on her starboard side, was bound to keep out of her way, and the steamboat was bound to keep her course;

That the swinging out of the steamboat, when she met the cross tide, was not a change of her course;

That, as the pilot of each vessel saw the other in time to execute all manœuvres incumbent to avoid a collision, the question of lookout had nothing to do with the collision;

That the closeness of the steamboat to the piers did not contribute to the collision;

That the pilot of the ferry-boat should have taken the measures to avoid the steamboat, which were necessary, under the circumstances, and that the ferry-boat was solely in fault. *The Gen. Franz Sigel*, 550

3. SAILING VESSELS.

14. Where two schooners came in collision in the East river in the daytime, and the Court, on considering the evidence, was unable to determine in what way the collision was caused;

Held, That the case was one of inscrutable fault, and that the libel must be dismissed.

The libellant in a collision case must establish fault on the part of the opposing vessel causing the collision, or he can recover nothing. *The Breeze*, 14

15. A brig and a schooner came in collision in Long Island Sound, at night. The schooner was sailing to New York, and the brig was sailing from New York. The schooner saw the brig nearly ahead, and ported her helm. The brig saw the schooner nearly ahead, and first starboarded and then ported. There was a conflict of evidence as to the wind, the witnesses for the schooner claiming that it was nearly south, and those for the brig claiming that it was south-east. Each vessel claimed to have been close-hauled. The schooner had the wind on her port side. The brig had it on her starboard side. The brig struck the schooner on her port quarter. The brig alleged that she starboarded in obedience to a call from the schooner to "keep off:"

Held, That, on the evidence, the brig was close-hauled;

That, on the evidence of the brig, that she was heading east-northeast, and saw the green light of the schooner from half a point to a point on her port bow, the vessels were meeting nearly end on, and, under the 11th Article, it was the duty of the schooner to port, which she did;

That, if the courses were crossing, there was risk of collision, as the brig was drawing a point on to the course of the schooner, and, under Article 12th, the schooner, having the wind on her port side, was bound to keep out of the way of the brig, which she endeavored to do by porting;

That, if they were meeting, it was the duty of the brig to port, instead of first starboarding, as she did; and that the excuse which she set up for the starboarding was not established;

That, if the courses were crossing, it was the duty of the brig to keep her course;

That, in either view, the brig was in fault, and liable for the damages;

That the schooner was not in fault.
The Annie Lindsey, 290

16. Two schooners came in collision in Long Island Sound in a clear night. They were sailing on meeting courses, not varying more than half a point from being exactly opposite courses. Both vessels had the wind free; neither made any change of course before the collision:

Held, That the case was one for the application of the 11th of the Rules for avoiding collisions. That both vessels were, therefore, bound to have ported their helms, and, as neither had done so, both vessels were in fault, and the damages must be apportioned.

Whether the 11th Rule is applicable to the case of two sailing vessels meeting end on or nearly so, one being close-hauled and the other sailing free, *quere*. *The Sylvester Hale*, 523

17. Two schooners, the H. and the M., came in collision at night in Chesapeake Bay. The M. alleged that the wind was east-northeast and she was sailing south; that she saw both lights of the H. a little to windward of her course, coming up the bay,

heading north, and close-hauled; that the M. ported, but the H., instead of keeping her course, as she was bound to do, starboarded and caused the collision. The H. alleged that the wind was north-northeast, and that she was heading northwest by north half north, close-hauled, and that the M. was coming down about south, on a course which would have carried her astern of the H., but she ported and caused the collision, and that the H. kept her course, as she was bound to do, till the collision was inevitable, when she ported, in order to ease the blow:

Held, That the evidence from the H., that she was close-hauled, and as to her course by compass, was more reliable than that of the M., which was sailing free in any event;

That the M. mistook the course of the H.;

That the courses of the vessels were crossing, and the case fell under the 12th and 18th Rules, and the M. was bound to keep out of the way, and the H. was bound to keep her course;

That, on the pleadings, the M. could not claim that the H. was in fault for not porting;

That the M. was responsible for the collision;

Whether, if the vessels had been meeting end on, or nearly so, the case would have been one requiring the H. to port her helm, *quere*. *The Helen J. Holway and the Enoch Moore*, 536

4. VESSEL AT ANCHOR.

18. A sloop at anchor was sunk in the night, and a libel was filed against a schooner to recover the damages, alleging that the schooner negligently ran into her and sank her, in consequence of the schooner's being insecurely anchored. The answer of the schooner denied any collision, and alleged that the schooner was properly anchored, and dragged her anchors through the resistless force of the elements alone, and alleged that, if any injury was done to the sloop by the schooner, it was the result of inevitable accident:

Held, That, on the evidence, it was proved that there was a collision between the two vessels sufficient to account for the sinking of the sloop;

That therefore, on the pleadings, the burden of proof was on the schooner to show that that collision was caused by inevitable accident, and that she had failed to establish it. *The Dutch-*
48

19. The brig N., while lying at anchor in the port of New York, was run into by the bark M., which drifted down upon her with the tide in the night. The defence set up by the bark was, that she was forced from her own anchor by an irresistible field of ice brought down on her by the tide. As to the presence of any such field of ice, there was a conflict of evidence; but the evidence showed that the port anchor of the bark had no stock, and that the chain of the starboard anchor was fouled when it was got up on the morning after the collision:

Held, That, on the evidence, the bark had failed to show that the drifting was an inevitable accident. *The Midas*,
178

20. A schooner, lying at anchor off Caldwell's, in the Hudson river, was sunk by a collision with a tow, which passed her in the night. Her owners filed a libel against two steamboats, which, fastened alongside each other, had towed some boats by the schooner that night. The schooner alleged that she was struck first by one of the two steamboats and then by the boats in tow. The steamboats alleged that, while there was a slight collision between one of them and the bowsprit of the schooner, the blow which did the injury to the schooner was given by the boats of another tow, which passed up the river ahead of them:

Held, That, on the evidence, the schooner had failed to establish that the blow which caused her to sink was inflicted by the two steamboats or the boats in tow of them, and that the libel must be dismissed. *The Anna and the Carrie*,
340

21. A canal-boat lying at a pier was sunk by injuries received by her during the night, in consequence of her coming in contact with a bark, which was also moored there. A libel was filed to recover damages for the injury, which alleged negligence on the part

of these in charge of the bark, in not putting out fenders between the canal-boat and the bark, and in not having the bark properly moored. The evidence showed that the wound on the canal-boat which caused her to sink was such a one as would have been caused by a fender, and that there was nothing on the outside of the bark which could cause the injury except a fender. As to whether a fender was put out or not, the evidence was contradictory:

Held, That, on the evidence, the presence of the fender was proved, and the charge of negligence, in not putting out a fender, was not established;

That the bark was properly moored and out of contact with the canal-boat; that the canal-boat drove against the bark, and the bark then did all that could be required of her, by putting out the fender, and keeping it there;

That the bark was not in fault. *The New York*,
408

22. A barque, lying at anchor, near the breakwater, off Newport, Rhode Island, was sunk by a steamboat, in the night, in a fog. The barque was lying in the channel which the steamboat usually passed through in entering the harbor in a fog. The steamboat ran at the rate of fifteen or sixteen miles an hour, till she was within about a mile of the barque, when her engine was slowed, and she ran under that slow bell, blowing her steam whistle occasionally, till very near the barque, before the presence of the barque was known, although a vigilant lookout was kept. A bell was struck on board the barque, but not in a manner adequate to arrest the attention of those on board the steamboat, and no other noise was made upon her, except that the lookout shouted, but too late to be of any avail;

Held, That the steamboat was in fault in not going at a moderate speed in a fog;

That, if the barque had had a vigilant lookout, as he was bound to know the usual hour of the arrival of the steamboat, and bound to know what sound her steam whistle would make, he could, by seasonably making adequate noises on the barque, have made her presence and position known, in

season to have enabled the steamboat to avoid her;

That the making of such noises was a precaution required by the ordinary practice of seamen, and the special circumstances of the case, and the barque was, therefore, also in fault, and the damages must be apportioned. *The Bristol*, 477

See COLLISION, 3.
DAMAGES.

CONSUL.

A State Court has no jurisdiction of an action against a foreign consul. *McKay v. Garcia*, 556

See ARREST.

CONTEMPT.

See INJUNCTION.
JURISDICTION, 4.

CORPORATION.

1. A life insurance company is a business corporation, within the purview of section 37 of the bankruptcy Act. *The Hercules Mutual Life Assurance Society's Case*, 35

2. A corporation has power to make commercial notes, without express authority. *Id.*

See JURISDICTION, 3.
MORTGAGE, 1.

COSTS.

1. In a suit for freight, the answer admitted that freight was due, but the amount was not paid into court, and the libellant obtained a decree for the amount admitted to be due:

Held, That the libellant was entitled to costs. *Nine Thousand Six Hundred and Eighty-one Dry Ox Hides, &c.*, 199

2. Where the marshal holds property under several processes in admiralty, the proper rule as to the *per diem* custody fee, is to divide it equally, for each day, among the cases wherein

the vessel was held by process in force on that day, saving to the marshal, in case any party fails to pay his proper proportion, a remedy therefor against the other parties.

No compensation for custody of property held by the marshal under process, in admiralty, can be made to him, beyond \$2.50 per day. *The Circassian*, 513

See BANKRUPTCY, 17.
INJUNCTION.
PLEADING, 1.
PRACTICE IN BANKRUPTCY,
6, 7, 8.
SALVAGE, 1, 2.
SEAMEN'S WAGES, 6.
WILL.

D

DAMAGES.

1. Two barges, loaded with coal, were sunk by a collision in Hell Gate. The commissioner to whom it was referred to ascertain the damages caused by the collision reported certain sums as being the value of the barges and their cargoes, as being totally lost. The claimants excepted to the report, on the ground that no proper or suitable efforts were made to raise the barges:

Held, That the exception must be overruled, because it appeared, on the evidence, that reasonable exertions were made to raise the vessels and save the cargoes by the use of such nautical skill as owners of vessels usually employ in such emergencies. *The Galatea*, 259

2. It appeared that a small quantity of coal was raised from the wreck, and appropriated to his own use by the libellants' agent:

Held, That the libellants, and not the claimants, were chargeable with the loss of this coal. *Id.*

3. The report of the commissioner reported a certain sum for freight on the cargoes. The claimants excepted to the allowance of that amount, on the ground that no deduction had been made from the gross freight for the expenses of completing the voyage:

Held, That, as it did not appear from the report how the commissioner arrived at the sum which he allowed, or that he did not make the deduction referred to, the exception would not lie. The report should have been excepted to, as not stating the principle on which the sum was allowed, or a motion should have been made to send the report back for correction.

Id.

4. A propeller having a canal-boat in tow, which had sprung a leak while being towed, cast her off in such a way that she failed to reach a dock, and drifted off into deep water, and sank. She had a cargo of wheat, part of which had been wet by the leak before the boat was cast off. How much was wet was in dispute:

Held, That, as it appeared that the canal-boat could have been put into shoal water near the dock at the time she was cast off, the total loss of so much of the cargo as was then uninjured was occasioned by the negligence of the propeller;

That, on the evidence, 800 bushels of the wheat was then wet and worthless, and that the loss was the value of the cargo, less 800 bushels. *The J. L. Hasbrouck*, 272

DELIVERY OF CARGO.

See BILL OF LADING, 4.

DEMURRAGE.

See CHARTER, 1.

E

ESTOPPEL.

A libel in prize was filed, in June, 1865, against the steamer *Wren*, in the District of Florida. The master, S., appeared and filed a claim, as bailee for the owner, alleging that L., a British subject, was the owner, as appeared by the register of the steamer. The District Court condemned the vessel as enemies' property, and a writ of *venditioni exponas* was issued, and the

vessel was sold, and the proceeds were deposited with the Assistant Treasurer of the United States, in New York, subject to the order of the Court. An appeal was taken from that decree to the Supreme Court of the United States, which reversed the decree, and directed restitution of the vessel to the claimant. F. and T., attorneys, in New York, directed and had charge of this appeal, and paid the expenses of it, and obtained the mandate of the Supreme Court. They then obtained a power of attorney from L. and S., authorizing them to collect the proceeds of the *Wren*, and receive the restitution decreed. After the decree in the Supreme Court, but before the mandate was filed, C. and others, the present libellants, by their proctor, W., filed a libel, in the District Court of Florida, against L., and issued a foreign attachment against the proceeds of the *Wren*, as his property. F. and T. thereafter employed an attorney in Florida, who filed the mandate and a copy of the power of attorney from L. and S. to them, and entered a final decree in the prize case, directing the payment of the money to L., claimant. The same attorney also entered a special appearance for L., as respondent, in the suit brought by C. and others, and moved to dissolve the attachment. In the mean time, negotiations took place between W., the attorney for C. and others, at New York, and F. and T., looking to a removal of that second litigation to New York, and it was agreed that W. should make no objection to the removal of the fund to New York, and that F. and T. should receive it under their power from L. and S., and hold it long enough to enable W. to take such legal steps as he might be advised. Accordingly, instructions to that effect were sent to Florida, the attachment there was dissolved on the entry of an absolute appearance for L., and the funds were paid to F. and T., in New York. Thereupon this suit was commenced by W., for C. and others, against L., and a foreign attachment was issued against these funds in the hands of F. and T., as the property of L., and the funds were duly attached. F. and T. thereupon appeared, on the return of the attachment. Interrogatories to them were

filed, to which they filed answers, denying that they had any funds of L. in their hands, and setting up, that, before the commencement of the prize suit, the Wren had been sold by L. to one P.; that they had acted, in all that they had done, as attorneys for P., and had never been retained by L., and that the proceeds in question were the property of P., and not of L. This issue being brought to trial, the libellants offered in evidence the complete record in the prize case, and the record in the other suit in the Florida Court, and proof of the agreement between W. and F. and T. F. and T. then offered in evidence a bill of sale of the Wren from L. to P., dated and recorded before the commencement of the prize suit, and proof of their retainer by P., and not by L. P. was a member of the firm of Fraser, Trenholm & Co., agents of the Confederate States, at Liverpool:

Held, That the final judgment in the prize case was a judgment that the Wren was the property of L.;

That neither P. nor F. and T., who had procured that judgment to be rendered, could be heard now to allege the contrary of the fact there adjudged;

That F. and T. were estopped by what had taken place between them and W., from saying, in this suit, that the proceeds of the Wren were not the property of L. *Cushing v. Laird*, 408

EVIDENCE.

1. Evidence of the manifestation of a like fraudulent intent at prior times, in respect to kindred matters, may be offered to prove the existence of the fraudulent purpose or design mentioned in the 48th section of the internal revenue Act of June 30, 1864, as to the articles in question. *The U. S. v. A Quantity of Tobacco*, 68
2. On an examination of a bankrupt, under specifications in opposition to his discharge, the question was whether the bankrupt had kept proper books of account. The opposing creditor had offered in evidence the stump of a check in a check book.

The bankrupt offered the check itself in evidence, which was objected to:

Held, That the check was admissible in evidence. *Brockway's Case*, 326

3. The answers of garnishees to interrogatories addressed to them by the libellants, are not evidence in their favor on the trial of an issue, whether they had in their possession property subject to the attachment. *Cushing v. Laird*, 408

See PRIZE.

SEAMEN'S WAGES, 9.
STEAMBOAT ACT, 2.

F

FREIGHT.

The owner of a bark filed a libel against her cargo of hides to recover freight. The hides were shipped to Buenos Ayres, to be delivered at New York on payment of freight at so much per pound. They arrived in good order, and were tendered to the consignee, to be delivered on payment of \$1,515 79, freight. This amount was arrived at by taking the weight stated in the invoice and entry presented by the consignee at the Custom House on his entry of the goods. The bill of lading did not state any weight. As the consignee refused to pay the amount claimed, the owner of the ship filed a libel against the hides to recover the freight, and the consignee gave a stipulation for value, and took them. On the trial, the consignee proved an actual weighing of the hides after they were delivered, in accordance with which the freight would be \$1,417 01:

Held, That, in the absence of a statement of weights in the bill of lading, the ship was entitled to freight only on the weight delivered, and that the weight stated in the invoice and entry was not conclusive on the consignee;

That the ship is bound to weigh the cargo, whenever a weighing is necessary to enable her to compute her freight;

That the ship was entitled to a decree for the amount of freight calculated on the weight proved to have been actually delivered, viz., \$1,417 01. *Nine Thousand Six Hundred and Eighty-one Dry Oz Hides, &c.*, 199

See CHARTER, 2.

FORFEITURE.

An American register was obtained for a British vessel, under the Act of December 23d, 1852 (10 *U. S. Stat. at Large*, p. 149), on the statement that she had been wrecked off Cape May, which statement was false, and that repairs to an amount exceeding her previous value, had been put on her, a forged receipt for the payment of such repairs being exhibited. This American register was used by the person claiming to be owner, and he afterwards sold the vessel to a *bona fide* purchaser:

Held, That the vessel was forfeited to the United States, by virtue of the 27th section of the Act of December 31, 1792 (1 *Stat. at Large*, p. 298);

That this forfeiture was not defeated by a sale to a *bona fide* purchaser. *The Monte Christo*, 148

See INFORMER.

FRAUD.

See EVIDENCE, 1.
FORFEITURE.
IMPORT ACT.

G

GENERAL AVERAGE.

See BILL OF LADING, 2.

I

IMPORT ACTS.

1. If an importer, on entering goods at the Custom House, takes the oath

that the invoice of the goods, "contains a just and faithful account of the actual cost" of the goods, and is "in all respects true," when the cost stated in the invoice is not the actual cost, the oath is a false paper, and the importer knowingly makes the entry by means of a false paper, and the goods or their value are forfeited. *The United States v. Barnes*, 183

2. A passenger by a steamer from a foreign country had, among his personal baggage, three ordinary goods cases, filled with new and dutiable goods only, intended for sale as such. They were landed on the wharf with the personal baggage of the passengers. They were not named in the manifest of the vessel. No entry was made of the goods, nor had any duties on them been paid or secured to be paid; and no permit had been granted to land them, except the general baggage permit issued for the vessel, which authorized the inspector on board to "examine the baggage of all the passengers, and, if nothing be found but personal baggage, permit the same to be landed, and send all other articles not permitted in due time to the appraiser's stores." The cases were seized on the wharf, and an information filed to forfeit them, under the 50th section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 665), as landed without a permit:

Held, That, on the above facts, the jury must find a verdict in favor of the Government. *The U. S. v. Three Cases, &c.*, 558

See INFORMER.

INVOICE.
SMUGGLING.

INFANT.

Infants, in respect to their general contracts, are not embraced within the provisions of the bankruptcy Act, as subjects of either voluntary or involuntary bankruptcy *Derby's Case*, 232

See BANKRUPTCY, 8.

INFORMER.

The Act of July 18th, 1866 (14 *U. S. Stat. at Large*, 184), is not an Act

relating to the customs, within the meaning of the Act of March 2d, 1867 (14 *Id.* 546).

The proceeds of a forfeiture under that Act are to be paid directly by the Court, one-half to the collector of the port, for the use of the United States, one-fourth to the informer, if any, and one-twelfth each to the collector, surveyor and naval officer. *The Monte Christo*, 327

INJUNCTION.

In a bankruptcy proceeding, an injunction was issued, on a special petition of the petitioning creditors, enjoining a firm, of which B. was a member, and a firm, of which S. was a member, from prosecuting suits commenced by such firms respectively against the bankrupts, in Illinois, in each of which suits attachments had been issued, under which property of the bankrupts had been attached. The injunction was personally served on B. and on S. After such service, the proceedings under the attachments were continued to judgment, and the property was sold under execution. Proceedings were taken to punish both B. and S. for contempt in violating the injunction. S. set up, in defence, that the proceedings had been carried on by assignees of his firm, the assignment being made by a member of his firm then in Illinois, and who was not served with the injunction. B. set up that the further proceedings in his suit had been conducted by assignees of his firm, the assignment having been made by one D., a clerk of B.'s firm:

Held, That it was competent for the bankruptcy Court to restrain these attaching creditors from further proceeding against the property which they had attached as the property of the bankrupts;

That both B. and S. had violated the injunction of the Court by the further proceedings in the attachment suits;

That each of them, to purge his contempt, must show that he endeavored to stop the suit of his firm in Illinois, or that the claim had been, in fact, assigned before the injunction was served, neither of which things had been shown;

That a fine to the amount of the value of the attached property, with interest, and the expenses of the contempt proceedings, including a proper counsel fee, must be imposed on each of them. *The U. S. ex rel. Hyde v. Bancroft*, 392

See BANKRUPTCY, 5, 10, 16.
JURISDICTION, 4.

INSURANCE.

See BANKRUPTCY, 4.
CORPORATION.
PRACTICE IN BANKRUPTCY, 11.

INTERNAL REVENUE.

1. Under the 90th and 94th sections of the internal revenue Act of June 30, 1864 (13 *U. S. Stat. at Large*, 224), as amended by the Act of July 13, 1866 (14 *Id.* 150), and the 61st and 84th sections of the Act of July 20, 1868 (15 *Id.* 152, 153), a completed sale or a completed removal of manufactured tobacco is a necessary preliminary to the accruing, assessment and payment of the tax upon it.

But the provision in the 48th section of the Act of 1864, as amended by the Act of 1866, which provides for the forfeiture of goods "on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws," does not require that there should have been a completed sale or removal of such goods.

The provision in the said 48th section, in respect to the forfeiture of raw materials, is not dependent on the provision in regard to taxable articles, so as to make the forfeiture of the raw materials dependent on their being seized in the possession of a person in whose possession forfeitable taxable articles are found.

Under the said 48th section the *corpus delicti* is the possession of the specified property with the specified fraudulent purpose or design, without the doing of any overt act in respect of it. *The U. S. v. A Quantity of Tobacco*, 68

2. Under the 94th section of the Act of June 30, 1864, above cited, as amended by the 9th section of the Act of July 13, 1866, tobacco made of leaves from which part of the stems had been removed, and to which an equal proportion of other stems, prepared in a certain way, had been added, and which had not been sweetened, was taxable at forty cents a pound, after the 1st of August, 1866. *Id.*

3. A manufacturer of tobacco made a pretended sale of a quantity of tobacco on the day before an Act increasing the tax on it went into effect, and paid the tax as on a sale. The increased tax went into operation, and was afterwards reduced again below the former rate. After the reduction he sold the tobacco, but made no return of the sale and paid no tax on it:

Held, That the transaction was illegal, and that the manufacturer had no right to pay the tax when he did.

It was also the course of business, in his establishment, to remove from the wholesale department to the retail department a quantity of tobacco at once, and to make a return and pay tax on it as one sale, and not to make any record, or return, or pay any tax on the actual sales of it in the retail department:

Held, That this was an illegal mode of doing business, and that it was for the jury to say what was the intent of the manufacturer in adopting that mode. *Id.*

4. Under the 44th section of the internal revenue Act of July 20, 1868 (15 *U. S. Stat. at Large*, p. 142), and the joint resolution of the same date, if a person, having a wash and also a still on his premises, capable of distilling, does there distill fermented liquors, his premises not being an authorized distillery, all the personal property found in the premises is forfeited, notwithstanding that the product of the establishment be not distilled spirits, but vinegar. *The U. S. v. Steen & Cwergius' Factory*, 172

5. The 48th section of the internal revenue Act of July 20th, 1868, as amended by the 12th section of the Act of June 6th, 1872 (17 *U. S. Stat. at Large*, 240), imposes a tax, to be collected by

affixing a stamp on each bottle, "on all wines, &c., made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States." An information was filed against certain wines, alleging that they were imitation sparkling wines, made "by the direct injection of carbonic acid gas, by a wholly mechanical process, into wines made from grapes grown in the United States, not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes) with said carbonic acid gas injected therein as aforesaid, to make a new product known as and being an imitation sparkling wine or champagne." The claimant of the wine demurred to the information:

Held, That the article was none the less free from tax, as being "made from grapes grown in the United States," notwithstanding the carbonic acid gas was injected by a separate process of manufacture. *The U. S. v. One Case, &c.*, 493

6. A manufacturer of cosmetics in New York, having received an order from a customer at Havana, put up the goods and sent them, without any internal revenue stamp being affixed to any of the boxes, to the wharf of the Havana steamer, for transportation to Havana. The owners of the steamer gave a receipt for them. They were then seized by the Government, and an information was filed to forfeit them, on the ground of their not having stamps on the boxes. The goods were not manufactured in the warehouses prescribed by the 28th section of the internal revenue Act of March 3d, 1873 (12 *U. S. Stat. at Large*, 727), and the 168th section of the Act of June 30th, 1864 (13 *Id.* 296):

Held, That, under the 167th section of the Act of June 30th, 1864, as amended by the 1st section of the Act of March 3d, 1865 (*Id.* 482), the goods should have been stamped, although they were intended for exportation, and, not having been stamped, were liable to forfeiture. *The U. S. v. 236 Dozen Boxes, &c.*, 543

INVOICE.

An invoice which states the cost of the goods falsely, is a false invoice, within the meaning of the Act of March 3d, 1863 (12 *U. S. Stat. at Large*, 738), even though the cost is not required to be stated in the invoice because the goods are not subject to *ad valorem* duty. *The U. S. v. Barnes*, 183

J

JUDGMENT.

See *BANKRUPTCY*, 20.
ESTOFFEL.

JUDICIAL NOTICE.

See *STEAMBOAT ACT*, 2.

JURISDICTION.

1. A Court of Admiralty has no power to decree a sale of a vessel, at the instance of the owners of a minority interest, except, perhaps, as the result of the failure of the owners of the majority interest to give security for the safe return of the vessel.

A Court of Admiralty has power to decree a sale, in case of a dispute between owners of equal moieties, as to the employment of the vessel.

A Court of Admiralty has no jurisdiction in matters of accounting between part owners of a vessel.

A Court of Admiralty cannot require the owners of a majority interest in a vessel to give a bond to the minority interest to cover indebtedness of the vessel to the minority owners, or to indemnify them against loss in her future employment. *The Ocean Belle*, 253

2. A libel to recover damages for injury to a pier by overloading it, which states that the pier is within navigable waters from the ocean, and within the ebb and flow of the tide, and does not show that the pier is part of the land, is not liable to exception, as failing to state a case within the jurisdiction of the Admiralty. *The Moyer, &c. v. Highland*, 289

3. A District Court has jurisdiction to declare bankrupt a corporation which has been dissolved by a State Court, but the proceeding must be commenced within six months after the corporation has been dissolved. *The New Amsterdam Fire Ins. Co.'s Case*, 368

4. In proceedings in involuntary bankruptcy, on a petition by creditors after an adjudication in bankruptcy, an injunction was issued restraining certain creditors from interfering with the property of the bankrupts. This injunction was served on S., one of the creditors, before an assignee was chosen. Afterwards proceedings were taken to punish S. for contempt, in violating that injunction, which resulted in an adjudication that he was guilty of contempt. He then applied to the Court to vacate the injunction, on the ground that the Court had no jurisdiction to grant the injunction on a petition:

Held, That the Court had jurisdiction to make the injunction which it issued, and that the motion must be denied. *Ulrich's Case*, 483

5. The admiralty has jurisdiction of a contract made between the master of a ship and a cooper, to put the cargo of the ship in landing order, the services being rendered partly on the ship and partly on the wharf, but before the delivery of the cargo. *The Onore*, 564

See *BANKRUPTCY*, 8.

CONSUL.

LIMITED LIABILITY.

POSSESSION.

PRACTICE IN *BANKRUPTCY*, 1.

L

LIMITED LIABILITY.

1. A steam propeller, running between Providence and New York, was burned at her dock in New York, on May 24th, 1868, with a valuable cargo on board. Portions of the cargo were saved, but not in a condition to be delivered. The wreck of the vessel was sold for \$5,000. Various shippers

of cargo on board the vessel commenced suits against the corporation which owned her, to recover for the loss of their goods. These suits were pending in the Courts of the States of New York, Rhode Island and Massachusetts. In 1872, the owners of the steam propeller filed a libel and petition in Admiralty, under the 55th, 56th, 57th and 58th Admiralty Rules of the Supreme Court, for the purpose of obtaining the benefit of the limitation of liability given by the Act of March 3d, 1851 (9 *U. S. Stat. at Large*, 635). On the filing of the petition, the Court made an order directing that an appraisement of the value of the interest of the petitioners in the vessel and her freight be made by the clerk, on proofs to be presented to him, and on hearing the petitioners and such of the parties as had begun suit in this District; and that notice of the hearing be given to the attorneys of such parties, and that, in the mean time, the said parties and their attorneys be enjoined from the further prosecution of those suits. One of those parties moved to set aside that order:

Held, That the proceeding thus instituted is a matter of exclusive Admiralty jurisdiction. It is substantially a suit *in rem* against the vessel and its pending freight;

That the Supreme Court had power to make the 55th Admiralty Rule, notwithstanding the provision in the Act of March 2d, 1793, § 5 (1 *U. S. Stat. at Large*, 335), that an injunction shall not "be granted to stay proceedings in any Court of a State;"

That the Rules, above named, do not transcend the Act of 1851, or the power of the Supreme Court to make rules, under the 6th section of the Act of August 23d, 1842 (5 *Id.* 518);

That the 3d section of the Act of 1851, was applicable to the case presented on the petition, although the loss was a loss by fire. *Petition of the Owners of the Oceanus*, 124

2. A collision occurred between a steamboat and a schooner, by which both vessels were sunk. The steamboat was raised by her owners and repaired, after which various suits were brought against her in Admiralty, to recover damages for such collision. Those suits were consolidated, and, by or-

der of the Court, one stipulation for the value of the steamboat was given in all. Subsequently her owners filed a petition, for the purpose of obtaining the benefit of the Act of March 3d, 1851 (9 *U. S. Stat. at Large*, 635), limiting the liability of ship owners, praying an appraisement of the value of the petitioners' interest in the steamboat and her freight, for that purpose. Objection was made on behalf of the parties who had claims against her:

Held, That it was not necessary to the jurisdiction of the Court over this matter, that the Court should have possession of the vessel or her proceeds, or of a fund representing the proceeds, over which the Court had already obtained control, through the exercise of its ordinary jurisdiction;

That the pendency of the suits against the vessel, and the existence of the stipulation for value given in those suits, afforded no reason why this proceeding should not be taken, and that the petitioners were entitled to the order directing the appraisement as prayed for.

A proceeding, to obtain the benefit of the Act in question, is not an action *in rem*, but is a proceeding *sui generis*, which partakes rather of the character of a suit *in personam*. *Petition of the Owners of the City of Norwich*, 330

3. The Act of March 3d, 1851 (9 *U. S. Stat. at Large*, 635), limits the liability of the owner of a ship for injuries to persons, as it limits such liability for injuries to property.

Notwithstanding the language of the 4th section of the Act, it can be carried into effect by a Court of Admiralty.

In case the fund provided for by the Act is insufficient to satisfy the demands against it, the claimants on the fund must share *pro rata*. *Petition of the Owners of the Epsilon*, 378

LIMITATION OF SUITS.

An action at law was brought by an assignee in bankruptcy, to recover a debt due to the bankrupt before the adjudication. The petition in bankruptcy was filed December 31st, 1868, and the plaintiff was appointed assignee April 1st, 1869. The debt accrued February 5th, 1867. The de-

defendant pleaded specially, "that the cause of action did not become vested in or accrue to the plaintiff at any time within two years next before the commencement of the suit." The plaintiff demurred to the plea:

Held, That the limitation of two years, prescribed in the second section of the bankruptcy Act, did not apply to such actions as the present, and that there must be judgment for the plaintiff on the demurrer. *Smith v. Crawford*, 497

M

MARSHAL.

See Costs, 2.

MASTER.

The master of a ship is, in a certain sense, a public officer. *The Irma*, 1

See BILL OF LADING, 1, 2.

BOTTOMRY.

CHARTER.

PRIZE, 1.

SEAMEN'S WAGES, 1.

MORTGAGE.

1. A corporation, incorporated under the general manufacturing law of the State of New York, executed a mortgage on real and personal property, and an assignment of two patents, as security for moneys due to the mortgagees from the company. The consent of two-thirds of the stockholders to the mortgage of the real estate was given. The holder of seventy-five shares, whose signature made up the two-thirds, had bought them at a sale ordered by the board of trustees, the stock having been held by two of the trustees, for the benefit of the stockholders. The purchaser of the shares at this sale, which was on credit, was a trustee. The sale was approved by the board. The assignee in bankruptcy of the company filed a bill to set aside the mortgage and assignment:

Held, That the mortgage was consented to by two-thirds of the stockholders, and its consideration was advanced in good faith;

That no consent was necessary to the mortgaging of the personal property, or the assignment of the patents;

That the mortgage and the assignment could not be set aside, but must be regarded as security for the moneys due from the company to the defendants at the time, and moneys advanced by the defendants on the faith of them.

Moran v. Strauss, 249

2. An assignee in bankruptcy received, as property of the bankrupt, real estate subject to mortgages, and collected rent due on a lease of the same made by the bankrupt. Proceedings were taken to foreclose the first mortgage, in which a decree was had, and the property sold and bought by the second mortgagee. The taxes on the property were paid by the second mortgagee out of his purchase money. He then petitioned the bankruptcy Court to direct the assignee to pay him the amount of the rent and of the taxes, out of the bankrupt's estate:

Held, That there was no ground on which he could claim either the rents or the taxes. *Poster's Petition*, 268

N

NEGLIGENCE.

A child, which was a passenger on a steamship from Liverpool to New York, was poisoned on the passage, and died, as was alleged, in consequence of negligence on the part of the officers of the ship. The father, having been appointed administrator of the child, filed a libel against the vessel to recover damages, to which libel exceptions were filed by the claimants of the vessel:

Held, That the cause of action arose on contract, and survived to the administrator, and might be sued for *in rem*. *The City of Brussels*, 370

See BILL OF LADING, 4.

COLLISION.

TUGBOAT AND TOW.

O

OWNERS.

See JURISDICTION, 1.

LIMITED LIABILITY.

P

PASSENGERS.

See CHARTER, 1.
IMPORT ACTS, 2.
NEGLIGENCE.

PAYMENT.

See BANKRUPTCY, 1.
SEAMEN'S WAGES, 6, 7, 8.

PENALTY.

Where a statute of the United States gives a penalty, and no particular remedy is prescribed for enforcing it, an action of debt may be brought to recover it, and the debt arises when the penalty is incurred. *Rosey's Case*, 507

See BANKRUPTCY, 17.
SMUGGLING, 1.
STEAMBOAT ACTS.

PILOTAGE.

1. A pilot tendered his services to a vessel to pilot her to New York by way of Hell Gate, the vessel being then to the eastward of Hart's Island. The tender of service being refused, he brought an action against the owners of the vessel to recover half pilotage under the Act of the State of New York of 1865 (*Session Laws of 1865*, p. 197). The respondents excepted to the libel, as not alleging that the vessel was navigating the channel of Hell Gate when the tender was made:

Held, That the Act was applicable to vessels bound to New York, to whom the tender of service was made as far east as Sand's Point, and that the exception was untenable. *Horton v. Smith*, 264

2. Under the Hell Gate Pilotage Act of the State of New York (*Session Laws of 1847*, p. 85, and of 1865, p. 197), when a vessel in the port of New York has entered upon a voyage, which will carry her through Hell Gate, she is bound to employ the first pilot who tenders his services to pilot her

through Hell Gate, or in case of refusal, to pay him half pilotage—and she is none less liable to pay the half pilotage, if, for any reason, the voyage through Hell Gate is not completed. *The Traveller*, 280

3. A Hell Gate pilot, on board of a vessel, claimed to have tendered his services as a pilot to a brig, which he was passing. He alleged that his services were refused, and filed a libel to recover half pilotage. His evidence of the refusal was contradicted by two witnesses from the brig:

Held, That, as there were other witnesses to the alleged refusal, who were not called, nor their absence accounted for, the libellant was not entitled to a decree on such a state of the proofs.

Whether such a tender of services by a pilot is sufficient to entitle him to half pilotage, *quere*. *The Thomas Turrall*, 404

See COLLISION, 12.

PLEADING.

1. To an action in debt on the bond given by a collector of internal revenue against such collector and his sureties, the defendants joined in pleading *non est factum*:

Held, That, under such a joint plea, the defendants must sustain it as to all, or fail as to all. *The U. S. v. Halsted*, 205

2. A bill in equity was filed against the assignee in bankruptcy of the B. Insurance Company, alleging that such company had insured the complainant's vessel for \$10,000; that the B. Company obtained a re-insurance for \$5,000 of the S. Insurance Company; that there was a total loss of the vessel, and a right to recover the whole loss of the B. Company; that the B. Company applied to the S. Company for payment of the \$5,000, and, as a condition of receiving it, promised and agreed to and with the S. Company that it had paid, or thereupon immediately would pay the \$10,000 to the plaintiff; and thereupon the S. Company, relying on that promise and agreement, paid the \$5,000 to

the B. Company, in trust to immediately pay the same over to the plaintiff; and the B. Company received the \$5,000 from the S. Company, in trust for the plaintiff, and in trust to immediately pay it over to him; and that the B. Company, proposing and intending to pay to the plaintiff the said sum of \$5,000 received from the S. Company, caused a letter to be written to him, wherein was inclosed the said sum of \$5,000, and delivered the same to their secretary to send to the plaintiff, which the secretary did not do, but delivered the letter and the \$5,000 to the defendant, who received it in trust for the plaintiff.

The assignee demurred to the bill for want of equity:

Held, That a demurrer admits all relevant facts stated in the bill, but does not admit the conclusions of law drawn therefrom, although they are also alleged in the bill;

That a demurrer to a bill for want of equity cannot be sustained, unless no discovery or proof properly called for by, or founded on, the allegations of the bill, would make the subject-matter of the suit a proper case for equitable interference;

That the plaintiff could only maintain this suit on the ground of an express trust, and not because a trust in his favor had been created by the mere operation of law;

That the allegations of the bill as to a trust must be held to be allegations of fact, and not of conclusions of law; and that, under the allegations of the bill, the plaintiff would be allowed to prove that the \$5,000 was paid by the S. Company, and received by the B. Company, under an express trust;

That the plaintiff would also have the right to prove that the identical money so received by the bankrupt was retained as trust property, separate and distinct from the proper estate of the corporation;

That the demurrer must, therefore, be overruled, and the defendant must answer, but, as the case was one of serious doubt, without payment of costs. *Hosmer v. Jewett*, 208

3. A petition in involuntary bankruptcy, which states the giving to the peti-

tioner of an unlawful preference in respect to the debt, but does not surrender the preference, will be dismissed. *Raddo's Case*, 230

4. The owners of a vessel, destroyed by fire, filed a petition under the Act of 1851, limiting the liability of owners (9 *U. S. Stat. at Large*, 635), and obtained an injunction restraining the prosecution of suits which had been commenced against them by owners of cargo on board. The plaintiffs in one of those suits, without having presented their claims to the commissioner, as required by the 57th Rule in Admiralty of the Supreme Court, filed a paper called "exceptions and answer," seeking by it to contest the right of the owners of the vessel to exemption or limitation of liability:

Held, That this could not be done, but that the exception might stand as an exception to the jurisdiction of the Court to enjoin the parties. *Petition of the Owners of the Oceanus*, 258

See COLLISION, 18.

JURISDICTION, 2.

PENALTY.

SEAMEN'S WAGES, 1, 5.

POSSESSION.

- T. built a yacht, called the A., for D., in payment for which he was to receive a sum of money and another yacht belonging to D. He received part of the money, but did not take possession of the other yacht. D. sold the A. to H., by bill of sale, with the knowledge of T., who was present when the A. was delivered to H. and was employed by H. to take care of her. On the next day, T. took off her sails, delivered them to a cart which H. had sent for them, and took them to H.'s store, and there stored them. Afterwards H. paid T. \$5, on account of his care of the yacht. Some time after, on H. coming for the yacht, T. refused to give her up to him, claiming that she was his own. H. thereupon filed a libel of possession against the yacht and T., to recover possession of the yacht. No papers had been taken out at the Custom House for the yacht till after the sale to H., when T. took out

a license on his own certificate, as builder:

Held, That the Admiralty had no jurisdiction of the action. *The Amelia*, 475

See CHARTER, 2.

PRACTICE IN ADMIRALTY.

1. A seaman filed a libel against a cargo of coal, to enforce a lien for his wages upon freight money alleged to be due from E. & M. on the cargo. The cargo was seized under the process, and was claimed by the C. S. Co., but the only answer put in, was one by E. & M.:

Held, That the practice was irregular, but the irregularity would not be noticed, as no objection had been taken to it. *Conley v. The Freight of the G. C. Burras*, 12

2. The Admiralty creates its own forms of proceeding.

Where the Supreme Court has not by its rules provided for modes of proceeding, the District Courts have the power and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer. *Petition of the Owners of the Epsilon*, 378

See COLLISION, 1.

DAMAGES, 3.

LIMITED LIABILITY.

NEGLECTANCE.

PRACTICE IN BANKRUPTCY.

1. On the petition and schedules of one member of a copartnership, an adjudication of bankruptcy of the firm was made. It appeared that neither of the other members of the firm had consented to the adjudication of bankruptcy, and that they had no place of business within, and resided out of, the District where the petition was filed:

Held, That the adjudication as to the other members of the firm was erroneous, as the Court was without jurisdiction as against them, and that as to them such adjudication must be vacated, but should be allowed to

stand as to the petitioning member. *Martin's Case*, 20

2. In an examination of a witness respecting the estate of a bankrupt, on the application of a creditor, other creditors have not the right to intervene and to interpose objections to questions put.

In such an examination a witness is not entitled to counsel, even though his examination may establish a liability on his part to the bankrupt's estate, and must be compelled to answer questions respecting his transactions with the bankrupt. *The Stuyvesant Bank's Case*, 33

3. If the assignee, after three months from the adjudication in bankruptcy, requests the Court to call a second general meeting of creditors, it must be called, and the register has no discretion to refuse to call it. *Rosey's Case*, 137

4. A debt, existing at the time of the adjudication in bankruptcy, but not existing at the time of the commencement of the bankruptcy proceedings, is provable in bankruptcy. *Hennocksburch & Block's Case*, 150

5. A suit for assault and battery, having been commenced against the bankrupts prior to the commencement of the proceedings in bankruptcy, was continued to judgment before the adjudication, no leave of the bankruptcy Court having been obtained:

Held, That, as the claim was not provable until the judgment was obtained, it was not necessary to obtain such leave. *Id.*

6. On the petition of a creditor, showing that he and the assignee objected to the claim of B., another creditor, an order was made referring it to a referee to examine into the facts. Before any evidence was taken before the referee, the assignee appeared before the referee and objected to the proceedings, on the ground that, since the assignee was elected, B. had made proof of his claim in form satisfactory to the register, and that the proof had been delivered to the assignee, and registered by him, and that, since the election of the assignee, the petition

- ing creditor had not renewed his objection, and the assignee had never objected to the claim B., however, insisted upon proceeding with the reference :
- Held*, That the reference should not have been proceeded with, and that the order of reference should be vacated, leaving the parties to pay their own costs and expenses. *Baldwin & Burr's Case*, 196
7. If a trustee, who has been appointed under the 43d section of the bankruptcy Act, call a second general meeting of the creditors, the fees of the register incident to such meeting are not chargeable against the estate. *Hinsdale & Dougherty's Case*, 231
8. A petition in involuntary bankruptcy was filed against a firm, an injunction preventing them from parting with any of their property was issued, and a warrant of arrest under the 40th section of the Act was issued against one of the firm. The bankrupts employed attorneys, who applied for a discharge of the arrest, and attended on a reference to ascertain the facts, which resulted in the discharge of the warrant. An adjudication being had, the attorneys prepared the schedule and inventory required by the 41st section. Thereafter they applied by petition to be paid for such services out of the estate :
- Held*, That, under the circumstances, a moderate compensation for such services would be allowed them.
- The proper practice, in such a case, is for the bankrupts to apply to the Court in the first instance for leave to employ counsel. *Mansfield's Case*, 284
9. Where an order for the examination of a bankrupt is issued at the instance of a creditor who has duly proved his debt, the bankrupt cannot refuse to be sworn under the order, by reason of his claiming that he has an offset which extinguishes the creditor's debt, and desires to file a petition for the re-examination of the claim. *Kingsley's Case*, 300
10. A bankrupt's petition, which was filed in February, 1868, alleged only that he "had a place of business in New York." In February, 1873, he asked to file an amended petition, in which the words, "and has there carried on business of his own," were added :
- Held*, That the amendment could not be allowed, but that the application to amend might be renewed, on an affidavit showing the facts and the reasons why the amendment was not asked for sooner. *Wood's Case*, 339
11. N., having borrowed money of his mother-in-law, gave her his notes for it, and, as security for them, procured a policy of insurance on his life to the amount of \$4,000, for her benefit, and paid the premiums on it up to the date of his bankruptcy. On a surrender of the policy, she would be entitled, in its stead, to a paid up policy for \$158. The cash value of the policy, at the date of the bankruptcy, if surrendered, was \$13 13. The mother-in-law proved her debt, to the amount of \$3,450, setting forth the security :
- Held*, That, in order to ascertain the amount on which she was entitled to dividends from the estate, the cash value of the policy, if surrendered, viz., \$13 13, should be deducted from the amount of the debt, as proved. *Newland's Case*, 342
12. A firm was adjudged bankrupt, on petition of creditors, without opposition, the warrant was delivered to the marshal, a meeting of creditors was held, and an assignee chosen, who entered on his duties. Thereafter, one of the creditors applied to set aside all the proceedings as irregular, under the 16th General Order, because he had, previous to the filing of this petition against the bankrupts, filed a petition against them in another District :
- Held*, That the proceedings in this Court were regular, notwithstanding the prior filing of the other petition, and that there was no ground for setting them aside. *Harris & Co.'s Case*, 375
13. In a proceeding in involuntary bankruptcy, the marshal returned to the warrant that he had sent notices to the creditors named on a schedule delivered to him by the attorney for the petitioning creditor :

Held, That the return was defective, and must be amended.

The 12th section of the bankruptcy Act, and the 13th General Order must be complied with, as to the manner of serving such notices. *Ferris & Mahony's Case*, 473

See ARREST.

PRINCIPAL AND SURETY.

See BOND, 2.

PRIORITY.

See BANKRUPTCY, 11, 17.
BOTTOMRY.
LIMITED LIABILITY, 3.
MORTGAGE, 2.

PRIZE.

Notice of a prize suit against a vessel, given to her master, is notice to her real owner, and he is a party to such prize suit.

The claimant of a vessel, seized as prize of war, is allowed to give the papers of the vessel in evidence, and is, therefore, bound to see that they are true papers. *Cushing v. Laird*, 408

See ESTOPPEL.

R

RECEIVER.

See BANKRUPTCY, 15.

REGISTER.

See FORFEITURE.

RELEASE.

See SEAMEN'S WAGES, 8.

RENT.

The firm of M., B. & C. hired premises in New York city, at a rent of

\$7,500 per annum, payable monthly. On the 1st of May, 1872, they owed \$1,875 for the rent, and the landlord commenced proceedings to dispossess them. On the 6th of May a petition in involuntary bankruptcy against M., B. & C. was filed, and an injunction was issued restraining the debtors and all other persons from interfering with the debtors' property, which was served on the landlord. A warrant of dispossession was issued in those proceedings, but was not executed, and on the 20th of May a formal injunction was served on the landlord, ordering him to refrain from any interference with the property of the bankrupts, except to preserve the same. The marshal, on May 6th, took possession, under the warrant, of the bankrupts' stock of goods, on the premises in question. On May 22d, 1872, the landlord applied to the bankruptcy Court for a modification of the injunction, so as to allow of the execution of the warrant of dispossession. The application was denied. No application was made to the Court to order the removal of the goods from the premises, but the marshal was applied to to give up the premises, and also to pay rent, but he refused to do either. He remained in possession of the premises till December 13th, 1872. The landlord now applied to be paid rent of the premises at the rate of \$7,500 for the whole period, stating that he had had an offer of that sum for the premises, for the unexpired term of the lease, and that the premises were worth that sum:

Held, That the landlord was not entitled to claim rent at the rate of \$7,500 for the period, but was entitled to a reasonable compensation for the use and occupation of the premises. *Metz's Case*, 871

See BANKRUPTCY, 18.
MORTGAGE, 2.

S

SALE OF CARGO.

See BILL OF LADING, 2.
CHARTER.

SALVAGE.

1. The ship P. fell in with the brig M. about 175 miles from New York. The brig had lost her masts, but had rigged jury masts, and was making progress towards New York, her destination. The P. took her in tow and towed her till near Sandy Hook, when a tug took her to New York, where she arrived five days after she was taken in tow. Part of her chain having been left on board of the P., was demanded of her, but the master of the P. refused to give it up, saying they should hold it till the salvage was settled. The value of the brig, freight and cargo, was \$18,500:

Held, That the service was not towage merely, but salvage; that \$2,250 was a proper amount to be awarded, and that the libellants should not recover costs because of the refusal to deliver up the chain, such costs to be paid by the owners, unless the refusal was shown to have been without the knowledge of the owners, and, in that case, by the master. *The Minnie Miller*, 117

2. A brig, dismasted and in distress, was fallen in with at sea, by a pilot boat. The master of the brig had been hurt and was confined to his bed. Her owner was on board. The pilots boarded her and demanded \$5,000, to tow her into port. This was refused, and they came down to \$2,500, threatening to leave the brig if an agreement to pay that sum was not made. The master and owner thereupon agreed to pay them the \$2,500, and the pilot boat took hold of the brig, and after nine days towing, brought her in safety into the port of New York. The brig and her cargo were worth \$3,800.

Held, That, considering the value of the property, the agreement, under the circumstances, was an inequitable one, and would not be enforced;

That \$1,500 was as liberal a reward as could be awarded to the salvors;

That costs would be awarded to them, because the claimants offered no particular sum before suit brought. *The Waxford*, 119

3. The brig A. came into collision with another vessel, about 50 miles from

Sandy Hook, at night, in a thick fog, when it was blowing hard. She received injuries, which led her master and crew to think she was about to sink, and they left her and got on board the other vessel. The next morning, about 7 A. M., the fog cleared off, and the master of the A. saw her about eleven miles off, but made no effort to return to her. The bark W. S., bound to New York, came to the A., and put on board of her a mate and one man, who got sail on her, and proceeded towards New York, taking a pilot about 10 A. M., and a tug about 11 A. M., which for the agreed sum of \$600, towed the A. to New York, reaching the dock about 9 P. M. The A. was worth \$3,500, her freight amounted to \$1,500, and her cargo was worth \$25,589, making in all \$30,589. The master of the W. S. was sailing her under an agreement with her owners, to make this voyage on shares, he to navigate her, victual and man her, and pay half her port charges, and to receive half the earnings:

Held, That, whether this was strictly a case of derelict or not, it was the case of a vessel abandoned at sea, where no evidence was given of an intention on the part of her master to return to her, and the awards, which have been given in cases of derelict, might well be looked to, as affording some guide to the judgment;

That \$6,000 was a proper sum to be awarded as salvage, from which should be deducted the \$600 paid to the tug by the claimants;

That the master, by reason of the agreement between him and the owners, should receive \$500 more than otherwise would have been his share, and that the award be apportioned as follows:

To the Master of the W. S.	\$2,300
“ Owners “ “ “	1,800
“ Mate “ “ “	800
“ Seaman who went with him	200
“ 3 seamen who staid on the W. S., in proportion to their wages ..	300
<i>The Anna</i> ,	166

SEAMEN'S WAGES.

1. A libel was filed against a cargo of

coal on board of a canal-boat and against her master, to enforce a lien for seaman's wages, upon freight money alleged to be due from E. & M. on the cargo. It appeared that E. & M. had chartered the boat of her master for a specified rate, and that, before the commencement of the action, and without notice of the libellant's demand, they had paid to the master all the money due from them under the charter. It also appeared that the cargo was shipped by the C. S. Co. under an agreement with E. & M. for freight payable to E. & M., which was due and unpaid at the filing of the libel:

Held, That it was not necessary to determine whether the libellant could maintain an action to charge the charter money payable by E. & M. with a lien for wages, as such charter money had been paid over to the master without notice before the commencement of the suit;

That the freight money due from the C. S. Co. to E. & M. could not be held, because the libellant had not in his libel sought to charge it;

That the libellant was entitled to a decree against the master. *Conley v. The Freight of the G. C. Barras*, 12

2. A vessel was run on a reef in a well-known channel, where there was plenty of room, and was lost. The master was a man of experience in the waters, and accounted for the occurrence by his chronometer being wrong. The sailors brought suit against the owner of the vessel, to recover wages for the whole voyage, alleging that the voyage was broken up by fault of the owner:

Held, That, as it did not appear that the accident was the result of negligence, or incompetency of the master, or that, when the vessel sailed, the chronometer was not a proper one in good order, it could not be held that the voyage was broken up by fault, fraud or neglect of the owner. *Hill v. Murray*, 141

3. A seaman signed articles in New York, on board a British vessel, for a voyage to Dunkirk, at \$40 a month. At the time, it was stated to him that the voyage would end in New York. On the arrival of the vessel at Dun-

kirk, the seaman was discharged and reshipped at \$20 a month. On the return of the vessel to New York, he left her, and brought suit for his wages:

Held, That the agreement by the seaman was that the voyage should end in New York; that the subsequent agreements made by him, were made under duress, and were not binding on him; that he had the right to leave the vessel on her return to New York, and was entitled to be paid at the rate of \$40 a month. *The Lola*, 142

4. The shipping articles are not conclusive evidence of the contract of a sailor with the ship:

Effect must be given to an agreement by the shipping agent, made at the time the sailor signed the articles, and understood by the sailor to form part of the agreement, but not embraced in the articles. *Id.*

5. An admission, in an answer to a libel for seaman's wages, that the seaman shipped for the voyage and performed the service described in the libel, though coupled with a denial that any amount is due to him, and an allegation that he was guilty of smuggling, by reason of which the vessel was subject to penalties, and he forfeited his wages, is sufficient, in the absence of evidence, to entitle the seaman to a decree for his wages. *The Belle*, 287

6. A seaman, who had shipped in New York for a voyage to New Orleans and back, after the vessel had started on her return voyage from New Orleans fell from the yard and broke his arm. The owners of the steamer sent him at once to a hospital, paying his wages till the date of his leaving the ship, and afterwards brought him to New York. The seaman having filed a libel to recover wages for the rest of the voyage, and damages for the injury, the owners of the vessel paid the amount of the wages into Court, which the libellant drew out.

Held, that the libellant was entitled to the wages for the rest of the voyage, and as there was no proof or allegation of a tender of the amount, he was entitled to a decree for his costs. *The Cortes*, 288

7. Seamen shipped on a vessel in New York, for a voyage to Havana and back to New York. On the return of the vessel to New York, they were discharged without payment of any portion of their wages. There was no dispute as to the amount due them. Within ten days after their discharge, they filed a libel against the vessel to recover the wages and ten days' double pay, under the 35th section of the Act of June 7, 1872 (17 *U. S. Stat. at Large*, 262):

Held, That they were entitled to recover double pay for ten days, although the suit was brought before the expiration of ten days from their discharge. *The Columbia*, 398

8. The crew of the Ringleader shipped at San Francisco for a voyage to Hong Kong and other ports, and back to a port of discharge in the United States, under articles, in the heading of which was written a clause reducing their wages after leaving Hong Kong. On the arrival of the ship at the port of discharge, the men were offered pay at the reduced rate. They protested against the reduction, claiming ignorance of the clause inserted, but finally took the reduced pay and gave releases in full. They now brought suit for the balance due, reckoned at full pay for the whole voyage:

Held, That as the clause reducing the sailors' wages was unusual, and inserted in an unusual place in the articles, the ship owner must give clear proof that the sailors were clearly informed of and agreed to it.

Whether such a clause, so written, is valid, *quære*.

That on the evidence the agreement with the men was for \$25 a month for the voyage;

That all agreements and arrangements with sailors are subject to examination in a Court of admiralty, and if unjust will be set aside and disregarded;

That the libellants were entitled to recover the balance due them, notwithstanding their having signed releases in full. *The Ringleader*, 400

9. Sailors were shipped in New York for a voyage to San Domingo, at \$25 a month. They went on board the vessel and went to work, and were

afterwards told to go home to their boarding house for meals. On their return they were told that other men had been shipped in their place, and they filed a libel to recover damages for the loss of the voyage. On the trial, the three libellants testified that they returned the next day after they had been told to go home. The master testified that they did not return till the second day, and until after he had obtained other men in their places:

Held, That as the master could have called his mate and the shipping master to sustain him, and had failed to do so, without the suggestion of any difficulty in so doing, the question would be determined according to the statement of the greater number of witnesses;

That, on the evidence, therefore, the men were discharged without reason, and were entitled to recover damages for the loss of the voyage;

That half a month's wages was sufficient compensation. *The Dolphin*, 402

See BOTTOMRY.

PRACTICE IN ADMIRALTY, 1.

SMUGGLING.

1. A steamship arrived in the port of New York from England. Certain articles subject to duty were found on board of her after her arrival, concealed in the purser's room and in the ship's storeroom, which had been brought in her from England, and which were not entered on the ship's manifest. The master of the vessel testified that he made up the manifest; that he had no knowledge or information, at any time, that the goods were in the vessel; and that he took all precautions in his power to prevent smuggling. A libel was filed against the ship and the master to recover the value of the goods, but the suit was discontinued against the master:

Held, That, under the 23d and 24th sections of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 644), and the 8th section of the Act of July 18th, 1866 (14 *Id.* 180), the vessel had incurred a penalty to the amount of the value of the goods, which could be enforced against the vessel, even

though it had not been enforced against the master; and that the facts stated by the master did not bring the case within the proviso in the 24th section of the Act of 1799. *The Helvetia*, 51

2. On the arrival of a steamer at New York from France, two inspectors of customs were on board after all the passengers and their baggage had been landed. From some remarks which excited suspicion, they went to a state room which was locked, and in which was the barber of the vessel. Under a berth in the room they found two trunks containing fringes, braid, &c., without any articles of personal baggage. The trunks were marked with the name of the purser of the ship, but without his authority or knowledge. They were claimed by a man who occupied the room, and who had come in the ship, giving his services as second steward for his passage, receiving no wages and not being entered on the crew list. He had no invoice of them. He had made no declaration of their contents as dutiable, and they were not entered on the manifest of the ship. The inspectors seized the trunks. A libel was filed to forfeit the trunks and their contents, alleging a seizure by the collector. It was urged in defence, that the trunks were not concealed, and that the seizure was not made by the collector:

Held, That, under the 68th section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 677), goods, subject to duty, found concealed on board of a vessel, are subject to forfeiture, and all that the Government is bound to show, to make out a *prima facie* case for forfeiture, is that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer;

That the contents of these trunks were found concealed;

That, under the 2d section of the Act of July 18th, 1866 (14 *Id.* 178), the inspectors were authorized to seize them, and the libel might be amended accordingly. *The U. S. v. Two Trunks, &c.*, 218

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STEAMBOAT ACT.

1. A steamboat, engaged in carrying freight between New Jersey and New London, Connecticut, while at New London, received on board a number of persons and carried them to Mystic Island in the State of Connecticut, for the purpose of a prize fight, and then carried them to Noank, in Connecticut. She was not provided with life preservers, &c., as was required by the 5th section of the Act of August 30th, 1852 (10 *U. S. Stat. at Large*, 61), nor had her boiler been inspected, as required by the 9th section of that

Act. A libel was filed against her, to recover a penalty of \$500 therefor:

Held, That the power of Congress to regulate commerce among the several States extends to the waters traversed by the steamboat, but that it is requisite that the vessel which is to be subject to such regulations as those alleged to have been violated, should be engaged in inter-state or foreign commerce;

That this steamboat was not shown to have been so engaged, within the principles laid down in the case of *The Daniel Ball* (10 Wall. 557). *The Thomas Swann*, 42

2. A libel was filed against a ferry-boat engaged in carrying passengers and freight across the East river, from Astoria to New York city, to recover a penalty of \$500 for a failure to have her boiler inspected, as required by the 11th section of the steamboat Act of February 28th, 1871 (16 U. S. Stat. at Large, 440):

Held, That the Court would take judicial notice that Astoria was on Long Island, whose inhabitants have commercial relations with other States of the Union, and that it is by means of the ferry-boats that such commerce is carried on;

That proof that the ferry-boat did carry the ordinary load of passengers and freight, and was held out as ready to transport on such a thoroughfare all passengers and freight that might offer, was sufficient to throw upon the claimants the burden of proving that such passengers and freight were not destined for other States;

That, in the absence of such proof, the ferry-boat must be held to be within the provisions of the steamboat Act. *The Sunswick*, 112

T

TUG-BOAT AND TOW.

1. A canal-boat, properly placed in a tow, was being towed up the Hudson river. While going at a proper speed, where the channel was wide and deep, she was struck under her bottom by something which made a hole in her, and caused her to sink. A libel to

recover the damages was filed against the tow-boat:

Held, That, on the evidence, it appeared that while being towed in the ordinary and proper channel, the boat was struck by something under water, whose presence could not be known by any care exercised by those in charge of the tow-boat;

That, when it was shown by the tow-boat, that all care was taken to avoid obstructions, and that this obstruction was unknown, the burden of proof was shifted to the libellants, and that, in order to recover, they must prove that the sinking was caused by negligence, on the part of the tow-boat;

That, as they had failed in proving this, the tow-boat was not liable. *The America*, 122

2. On the 6th of November, 1871, a tug-boat took in tow a barge, at Elizabethport, N. J., to tow her to Brooklyn. She reached Port Johnson, in the Kills, that day, and left the barge there, coming on to New York herself that night. The next morning she took a tow back to Elizabethport, and there took in tow other boats, which she brought to Port Johnson, and there picked up the barge and started on with her. In towing the barge across New York bay, the latter was sunk in consequence of a storm. The tug-boat alleged that she left the barge at Port Johnson because the weather was such that it was unsafe to tow her through, and that the storm by which she was sunk, on the 7th, was an unexpected squall:

Held, That the tug was bound to have towed the barge from Elizabethport to Brooklyn, without leaving her at Port Johnson, unless there was good reason for doing so;

That, if it were shown that there was good reason for having left the barge at Port Johnson, the burden of proof was on the tug to show that there was no time, before she did take the barge in tow again, when she could have proceeded with her so as to have avoided the sudden squall;

That she had not shown this, and was liable for the loss of the barge and her cargo. *The W. E. Cheney*, 178

3. A tug-boat, having a schooner on her port side, and two schooners on her

starboard side, was towing them through Hell Gate. In going up the channel between Blackwell's Island and Long Island, a schooner passed them and got some distance ahead, but at the upper end of Blackwell's Island she lost the wind and lost great part of her headway. The pilot of the tug did not observe this as soon as others on the tow did and ran up quite close to her, and then stopped till the schooner got the wind again and went on, when he started his tug ahead, endeavoring to pass between the schooner and the Long Island shore. This movement and the set of the tide carried the tow too near the Long Island shore, and the starboard schooner struck on rocks and began to leak, and afterwards sank:

Held, That the pilot of the tug was in fault for not sooner seeing that the schooner ahead had lost her way, and taking measures accordingly, and that the tug was liable for the damage.
The Niagara, 469

See COLLISION, 11.
DAMAGES, 4.

TRUST.

See BANKRUPTCY, 7.
PLEADING, 2.

W

WHARFAGE.

The Act of the State of New York of May 6th, 1870 (*Session Laws of 1870*, p. 1696), fixed certain new rates of wharfage, "except that all canal-boats engaged in navigating the canals in this State, and vessels known as North river barges, shall pay the same rates as heretofore." A vessel propelled by steam power, for the sole purpose of towing boats on the canals, while in the process of construction, occupied a wharf in the port of New York:

Held, That she was a canal-boat within the meaning of the exception above stated, but was not engaged in navigating the canals, and was, therefore, liable to pay wharfage at the rate prescribed by the Act of 1870.
The Vermont, 115

WILL.

In 1853 the will of T. L. C. was admitted to probate. It made G. executor, and by it all the property of T. L. C. was given to his executor, to be sold and converted into money, and the proceeds invested. The executor was to apply the income to the use of the wife of T. L. C. during her life. On her death, the executor was to stand possessed of \$10,000 of the principal, in trust for a niece, and the rest he was to pay over and divide among several persons named (one of whom was A. B. C.), "their heirs executors, administrators, and assigns forever, in equal shares, as tenants in common, *per capita*, the issue of any such person named who may be then dead, to take his or her deceased parent's share." On December 22d, 1869, A. B. C. was adjudged a bankrupt, and on January 22d, 1870, an assignment in bankruptcy was executed to B. The widow of T. L. C. died in April, 1872, and G. then proceeded to close up his trust, and the share to go to A. B. C., who had survived the widow, was \$3,249 27. G. drew his check for that amount, dated May 11th, 1872, in favor of A. B. C., and gave it to his counsel, C., to give to A. B. C. C. had had actual knowledge of the fact that A. B. C. had been adjudged a bankrupt, and that B. was his assignee. He delivered the check to A. B. C., and took from him a release of the executor. On the 17th of May the check was deposited in a savings bank to the credit of the wife of A. B. C., with other moneys. On the 16th of June, the savings bank was notified by B. that he claimed the money, as assignee of A. B. C., and, on the 20th of June, B. filed this bill in equity against all the parties, to recover the money:

Held, That, under the will, A. B. C. had a vested interest in the money at the time of the adjudication in bankruptcy, which was part of his estate, and passed to his assignee, and it made no difference whether G. had any actual notice of the bankruptcy proceedings or not. That G. was chargeable with notice of the bankruptcy proceedings, by reason of the actual knowledge of them by his counsel, C., even though such knowledge did not

recur to the mind of C. at the time of the delivery of the check;

That no title to the money had passed to the wife of A. B. C., or to the savings bank;

That the bank was entitled to deduct its costs from the fund, and must pay over the remainder, and that B. was entitled to a decree against G. and A. B. C., for the amount of the check, less the amount so paid over by the savings bank. *Beecher v. Gilispie*, 356

WITNESS.

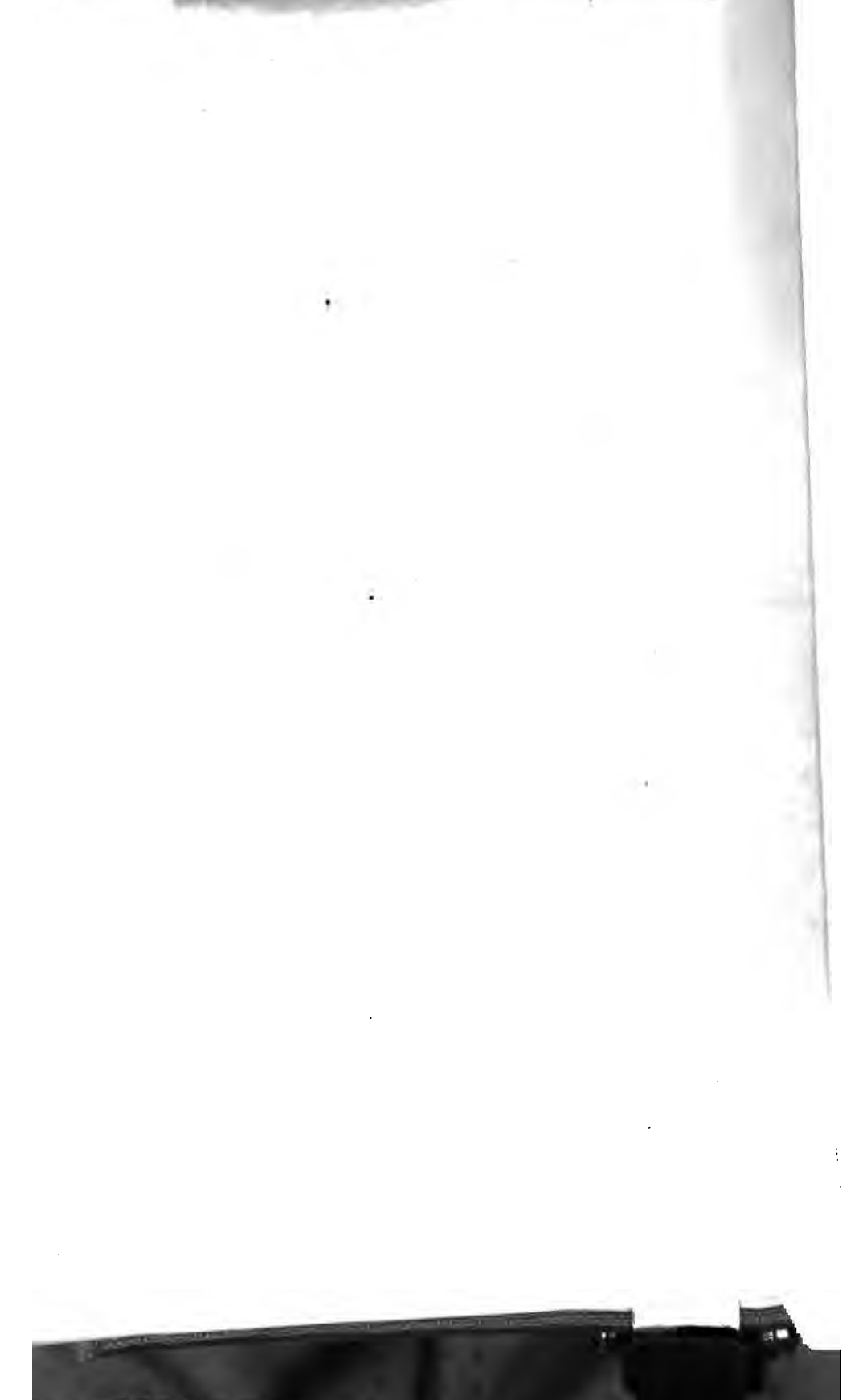
An attorney who is called as a witness in a proceeding in bankruptcy, is not entitled to add to the oath which he takes a reservation of a right to refuse to answer any question on the ground of privilege as the attorney or counsel of the bankrupt. *Adams' Case*, 56

See BOND, 1.

PRACTICE IN BANKRUPTCY, 2.













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